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CASES

ON

CRIMINAL PROCEDURE

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY

WILLIAM E. MIKELL, B. S.
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AMERICAN CASEBOOK SERIES
JAMES BROWN SCOTT
GENERAL EDITOR

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1910

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To

WILLIAM DRAPER LEWIS, B.S., LL.B., Ph.D.

who during many years of close association has been a constant friend,
a helpful critic, and an inspiring colleague

671028

THE AMERICAN CASEBOOK SERIES

For years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it: the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly: principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year; and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property, including
  the Law of Bailment.
Real Property. 1st Year.
  2d "
  3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical, and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Dean of the Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

Frank Irvine, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the George Washington University Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Professor of Law, Northwestern University Law School. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

Barry Gilbert, Professor of Law, University of Illinois. *Subject, Damages.* (Co-author with Floyd R. Mechem.)

Thaddeus D. Kenneson, Professor of Law, University of New York. *Subject, Trusts.*

Charles Thaddeus Terry, Professor of Law, Columbia University. *Subject, Contracts.*

Albert M. Kales, Professor of Law, Northwestern University. *Subject, Persons.*

Edwin C. Goddard, Professor of Law, University of Michigan. *Subject, Agency.*

Howard L. Smith, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Wm. Underhill Moore.)

Wm. Underhill Moore, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Howard L. Smith.)

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Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*

Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*

Ernest G. Lorenzen, Professor of Law, George Washington University. *Subject, Conflict of Laws.*

William C. Dennis, Professor of Law, George Washington University. *Subject, Public Corporations.*

James Brown Scott, Professor of Law, George Washington University; formerly Professor of Law, Columbia University, New York City. *Subjects, International Law; General Jurisprudence; Equity.*

James Brown Scott,
General Editor.

Washington, D. C., July, 1910.

Following are the books of the Series now published, or in press:

Administrative Law
Bills and Notes
Carriers
Conflict of Laws
Criminal Law
Criminal Procedure
Damages
Partnership
Suretyship
Trusts
Wills and Administration

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CASES ON CRIMINAL PROCEDURE

CHAPTER I

JURISDICTION

If two of the king's subjects go over into a foreign realm and fight there, and the one kill the other, this murder, being done out of the realm, cannot be for want of trial heard and determined before the common law. * * * If A. give B. a mortal wound in a foreign country, B. cometh into England and dieth, this cannot be tried by the common law, because the stroke was given there, where no visne can come. * * * If a man be stricken upon the high sea and dieth of the same stroke upon the land, this cannot be enquired of by the common law, because no visne can come from the place where the stroke was given (though it were within the sea pertaining to the realm of England, and within the ligance of the king).[1] * * * And before the making of the statute of 2 Edw. VI, if a man had been feloniously stricken, or poisoned in one county, and after had died in another county, no sufficient indictment could thereof have been taken in either of the said counties, because, by the law of the realm the jurors of one county could not enquire of that which was done in another county.[2] It is provided by that act that the indictment may be taken, and the appeal brought in that county, where the death doth happen.

3 Coke, Inst. 48.

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[1] It is provided by Rev. St. U. S. § 730 (U. S. Comp. St. 1901, p. 585), that in such case the courts of the district into which the offender is first brought shall have jurisdiction. St. 2 Geo. II, c. 21, provided that when the stroke is given in England and the death occurs out of England, or the reverse, the homicide may be inquired of in that part of England where either the death occurred or the stroke was given. The present statute, similar in its provisions, is St. 24 & 25 Vict. c. 100, § 10.

[2] Hale says (page 426): "It was *doubtful* whether he were indictable or triable in either, but the more common opinion was, that he might be indicted where the stroke was given." See Year Book, 7 Hen. VII, p. 8.

COMMONWEALTH v. KUNZMANN.

(Supreme Court of Pennsylvania, 1862. 41 Pa. 429.)

WOODWARD, J.[3] The indictment sets forth that a general election was held ~~in Pennsylvania on the~~ second Tuesday of October, 1861, under the laws of the commonwealth, and that in pursuance of the forty-third section of the general election law of 2d July, 1839, an election was held ~~at Camp Kalorama, in the District of~~ Columbia, on that day, by the captain and lieutenant of Company I, of the 21st regiment of Pennsylvania volunteers, the said company being then and there a detachment of militia and a corps of volunteers in actual service, under a requisition from the President of the United States, and by the authority of the commonwealth, and then goes on to charge that the defendant, ~~"not being by~~ law qualified to vote at said election, and being then and there an unnaturalized foreigner, did fraudulently vote" at said ~~election at Camp Kalorama~~.

To this indictment the defendant filed a general demurrer, and assigned as reasons for his demurrer that the forty-third section, under which the election at Camp Kalorama was held, was unconstitutional and void. By demurring, he admits that he was an unnaturalized foreigner, that he was not qualified to vote, and that he voted fraudulently—circumstances which would make him indictable under the 119th section of the general election law, if his offense had been committed in Pennsylvania. But how can the quarter sessions of Philadelphia ~~take jurisdiction~~ of a misdemeanor committed in the District of Columbia?

This question lies at the very threshold of this case, and although defect of jurisdiction is not one of the reasons assigned for demurring, yet the question is raised necessarily by the demurrer and, though not argued by counsel, must be noticed by us. We are not to be precipitated into the discussion of a grave constitutional question in a case of doubtful jurisdiction. The first duty, therefore, is to get a clear conception of this point.

The common law considers crimes and misdemeanors as altogether local, and cognizable and punishable exclusively within the jurisdiction where they are committed. "The lex loci," said Lord Brougham in Warrender v. Warrender, 9 Bligh, 119, "must needs govern all criminal jurisdiction, from the nature of the thing and the purpose of the jurisdiction." Story on Conflict of Laws, 620, and cases in note. In England, many statutes have been passed to change the general rule of the common law in regard to the venue of indictments and to make offenses committed within one jurisdiction triable in another; but, without a statute, a party who stole goods in one county and carried them into another was held to be indictable, at common law, in the latter county, upon the principle that the thief's possession of the goods is a fresh larceny in every county into which he carries them.

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[3] Part of this case is omitted.

This rule, however, does not prevail as among the states of our Union; for in Simmons v. Commonwealth, 5 Bin. 618, it was held that a thief who stole goods in the state of Delaware, and brought them into Pennsylvania, could not be indicted here.[4] Our federal government has provided itself with various statutes for punishing extraterritorial offenses when committed by our own citizens, which statutes rest upon the principle of public law that every nation has a right to bind its own citizens and subjects by its own laws in every other place—a principle which Judge Story explains to mean a right to exercise sovereignty over our own citizens, when they return within our territorial jurisdiction, but not a right to compel or require obedience to our laws on the part of other nations within their own territorial sovereignty. Conflict of Laws, 22.

Nor are we in Pennsylvania entirely destitute of legislation that is intended for extraterritorial application. The fifth article of our Constitution confers upon our courts the powers of courts of chancery to "obtain evidence from places not within the state," and by Act of Assembly of 14th April, 1828, supplementary to our recording acts, the Governor is authorized to appoint commissioners to take acknowledgment of deeds, etc., within any state or territory, and the duties of the commissioners are very specifically defined.

Whatever extraterritorial effect such laws may have is the result, not of any original power to extend them abroad, but of that respect which, from motives of public policy, other nations are disposed to yield to them, giving them effect with a wise and liberal regard to common convenience and mutual benefits and necessities. Says Chancellor Kent (2 Com. [8th Ed.] p. 579): "There is no doubt of the truth of the general proposition that the laws of a country have no binding force beyond its territorial limits, and their authority is admitted in other states not ex proprio vigore, but ex comitate; or, in the language of Huberus, 'qua tenus sine præjudicio indulgentium fieri potest.'" And according to Judge Story, in the silence of any positive rule affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. Conflict of Laws, 38; and see Chief Justice Taney's opinion in Bank of Augusta v. Earle, 13 Pet. 519, 10 L. Ed. 274.

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[4] Accord: Lee v. State, 64 Ga. 203, 37 Am. Rep. 67 (1879); Beal v. State, 15 Ind. 378 (1860); Van Buren v. State, 65 Neb. 223, 91 N. W. 201 (1902); State v. Le Blanch, 31 N. J. Law, 82 (1864).

Contra: State v. Underwood, 49 Me. 181, 77 Am Dec. 254 (1858); State v. Bartlett, 11 Vt. 650 (1839); Worthington v. State, 58 Md. 403, 42 Am. Rep. 338 (1882); Commonwealth v. White, 123 Mass. 430, 25 Am. Rep. 116 (1877); State v. Bouton, 26 Nev. 34, 62 Pac. 595 (1900). This result has been reached by statute in some states. Le Vaul v. State, 40 Ala. 44 (1866); Barclay v. United States, 11 Okl. 503, 69 Pac. 798 (1902).

This I understand to be a statement of the rule of judgment in the courts of the country in which the foreign law is executed, and it is to be inferred, as a matter of course, that the same rule would prevail in the courts of the country from which the law proceeded; that is, if the courts where the law is executed imply a tacit adoption of it from absence of objection, the courts of the jurisdiction furnishing the law will, much more, make the same implication. In addition to this, there are certain general rules in respect to the admission of the lex loci contractus, which are recognized in the judicial decisions of all countries. It has become a settled doctrine of public law that personal contracts are to have the same validity, interpretation, and obligatory force in every other country which they have in the country where they were made. Matrimonial rights, as between husband and wife, are determined by the law of their domicile, and personal property follows the law of the owner. These rules are generally recognised by the comity of nations. 2 Kent, 579, and cases in note.

Gathering up, now, so many of these principles as are applicable to the question before us, and making an immediate application of them, it may be said that if the Legislature of Pennsylvania provided by law that any of her citizens, qualified electors, happening to be in the District of Columbia on election day, might hold a valid election there, and an election was held in pursuance of such law, without objection from the local authorities, we are to hold the jurisdiction of our courts to extend to any of our own citizens who should violate any of the provisions of the law. We could not call on the judicial tribunals of the District to punish the infraction. They would not execute our law, and the fraudulent vote of the defendant would be an offense against no law of their own. It would be an offense only against our statute, and must be so laid in the indictment.

But the whole statute would be there, the penal sections as well as the enabling clauses, and if, in an attempt to exercise the privileges of the statute, a citizen incurred its penalties, he would be answerable in our criminal courts when he returns into our jurisdiction. As much so as false swearing under a commission issued out of our courts, or a forged acknowledgment of a deed under our Act of 1828, would be indictable and punishable here. His liability to our jurisdiction rests, however, be it observed, on his citizenship in Pennsylvania. It is because the volunteer soldier, in the service of the general government, is a citizen of Pennsylvania, that the general election law attends him beyond our territory, and becomes a rule of action for him wherever he is. It is no rule for the citizens of other states, or for unnaturalized foreigners, simply because we have no power to prescribe rules of action for the citizens and subjects of foreign governments.

What, then, is to be done with an unnaturalized foreigner, who casts a fraudulent vote under our election law beyond our territorial jurisdiction—a foreigner who is not alleged in the indictment to be a citizen for any purpose in Pennsylvania, nor to have a domicile here, nor even to belong to the militia or volunteers of the state? Have we jurisdiction to punish such a man for a misdemeanor committed beyond our borders? I think not. The officers who received his vote might be punishable. Possibly an indictment might be framed against him which the criminal courts of the District of Columbia would entertain. But how we can treat him as amenable to our jurisdiction on the face of this indictment I do not see.

Had it been ~~charged that he belonged to Company I,~~ of the 21st regiment of Pennsylvania volunteers, we might perhaps assume his citizenship; but this is not in the indictment. For aught we know, he may never have been in Pennsylvania until the time he was arrested for the misdemeanor alleged, and never have been a member of any company of Pennsylvania volunteers. For many purposes the states of the Union and the District of Columbia are not foreign countries to us, but so far as concerns the present question it is not necessary to state the distinctions which grow out of our peculiar political system, for we have no more power to legislate over a sister state or the District of Columbia than we would have to legislate for France or England. Then this is the case of a prosecution of an extraterritorial misdemeanor by an offender not alleged to owe any allegiance whatever to Pennsylvania. If we can entertain jurisdiction of such an offense, we must assume that there is legislative power to send the ballot box beyond our state lines, and that the judicial power accompanies it, to punish, not only our own citizens who violate it, but any intruder upon it from whatever nation of the earth he may come.

If it be said that, if the judicial power do not accompany it, there will be no way of protecting the purity of suffrage, then this would be an argument, not only against the constitutionality of those sections of the act which authorized it, but against the probability that the Legislature ever intended to give those sections any extraterritorial effect.

If, on the other hand, it were conceded that the judicial power of the state were competent to punish any offender against our election law at an election outside of our territory, though he be an alien and not a citizen, it might be pertinently asked what criminal court is to administer the punishment. The criminal jurisdiction of the quarter sessons of Philadelphia, like that of similar courts in other counties of the state, is limited to offenses committed in the proper county. The general rule is that they can take cognizance of no other.

If a citizen, subject when at home to the jurisdiction of one of these courts, commits an offense abroad against a statute of ours, and is punished for it by the appropriate court when he comes home, let that stand as an exception to the general rule. But neither the rule nor the exception will give the quarter sessions of Philadelphia jurisdiction to punish an offense committed outside of the state by a man who never belonged to the jurisdiction of that court. As well might the quarter sessions of Lancaster, Berks, or Greene county take cognizance of it. Is it indeed so that, without an enabling statute, all and singular the courts of quarter sessions of the state may take cognizance of an extraterritorial offense committed by a foreigner? The law would cease to be a system of principles and rules if such a thing were possible, and would become a mere jumble of incongruous and arbitrary powers.

We are ~~of opinion that the~~ court of quarter sessions of Philadelphia had ~~no~~ jurisdiction of the indictment prosecuted, and, consequently, we have none. We decline, therefore, to enter into a consideration of the constitutional question raised upon the record, but, for the reasons above given, affirm the judgment.

STATE v. CUTSHALL.

(Supreme Court of North Carolina, 1892. 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130.)

AVERY, J.[5] The statute (Code, § 988) provides that "if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina or elsewhere, every such offender, and every other person counseling, aiding, or abetting such offender, shall be guilty of a felony, and imprisoned in the penitentiary or county jail for any term not less than four months, nor more than ten years, and any such offense may be dealt with, tried, determined, and punished in the county where the offender shall be apprehended or be in custody as if the offense had been actually committed in that county." The general rule is that the laws of a country "do not take effect beyond its territorial limits, because it has neither the interest nor the power to enforce its will," and no man suffers criminally for acts done outside of its confines. 1 Bish. Crim. Law (7th Ed.) §§ 109, 110; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 335; State v. Barnett, 83 N. C. 616; State v. Brown, 2 N. C. 100, 1 Am. Dec. 548. In the case of State v. Ross, 76 N. C. 242, 22 Am. Rep. 678, the court said: "Our laws have no extraterritorial operation, and do not attempt to prohibit the marriage in South Carolina of blacks and whites domiciled in that state"—thus recognizing the principle, generally accepted in America, that a state will take cognizance, as a rule, only of offenses committed within its boundaries.

Among the exceptions to this general rule are the cases where one, being at the time in another state or country, does a criminal act, which

[5] Part of this case is omitted.

takes effect in our own state; as where one who is abroad obtains goods by false pretenses, or circulates libels in our own state, and contrary to our laws, or from a standpoint beyond the line of our state fires a gun or sets in motion any force that inflicts an injury within the state for which a criminal indictment will lie. 1 Bish. Crim. Law, § 110; Ham v. State, 4 Tex. App. 659; Cambioso v. Maffet, 2 Wash. C. C. 98, Fed. Cas. No. 2,330. Persons guilty of such acts are liable to indictment and punishment when they venture voluntarily within the territorial bounds of the offended sovereignty, or when, under the provisions of extradition laws or the terms of treaties, they are allowed to be brought into its limits to answer such charges. * * *

So a foreigner, not accredited to another government as a representative of his own nation, is subject to the law of the country in which he may travel or establish a temporary domicile, and may be tried in its tribunals for any violation of its criminal laws while within its territorial limits. Wheaton, in his treatise on International Law (section 120, note 77), says: "In Great Britain, France, and the United States, the general principle is to regard crimes as of territorial jurisdiction. * * * The question whether a state shall punish a foreigner for a crime previously committed abroad against that state or its subjects also depends upon its system respecting punishing generally for crimes committed abroad; Great Britain and the United States respecting strictly the principle of the territoriality of crime." While, in our external relations with other nations, our federal head, the United States, is the only sovereign, for the purpose of internal government such portion of the sovereign power as has not been surrendered to the general government is retained by the states. 11 Am. & Eng. Enc. Law, p. 440, and notes.

In the exercise of their reserved powers, especially in the execution of the criminal law, questions arise which are settled and determined either according to the principles of international law or by analogy to them. It is contended that nothing but comity between nations, in the absence of express provisions of treaties, prevents one nationality from making laws to punish persons who commit criminal offenses in another country, and afterwards come within its territory; and that, admitting this principle to be correct, there can be no treaty stipulation, and there is in fact no constitutional inhibition, that restricts the Legislature of one of our internal sovereignties from enacting laws to punish a person who comes into its domain, so as to be apprehended there, for a crime committed in a sister state. Article 29 of the confirmatory charter granted by Henry III. provided that "no freeman should be taken or imprisoned, or disseised of freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed, nor will we pass upon him or condemn him, but by lawful judgment of his peers or by the law of the land."

In the formal declaration of independence the king of Great Britain, after being charged with many violations of fundamental principles and invasions of common rights, was arraigned before the world "for depriving us in many cases of trial by jury; for transporting us beyond the seas to be tried for pretended offenses." This language evinces the purpose of our representatives to risk their lives and their fortunes, in part, at least, to secure, not simply the ancient right of trial by jury, but trial by a jury of the vicinage, within easy reach of all evidence material for the vindication of the accused, where the charge might prove unfounded upon a fair investigation. During the same year these principles were embodied in the declaration of rights by the colonial congress, in what now constitute sections 13 and 17 of article 1 of the Constitution, which are as follows:

"Sec. 13. No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men."

"Sec. 17. No person ought to be taken, imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."

Not only has section 13 been construed to guaranty to every person (whether a citizen of this state or of another commonwealth) a trial by jury in all cases, which were so triable at common law (such as an indictment for a felony), but a trial by his peers of the vicinage, unless, after indictment, it should appear to the judge necessary to remove the case to some neighboring county, in order to secure a fair trial. Judge Cooley says (Const. Lim. marg. pp. 319, 320): "Many of the incidents of a common-law trial by a jury are essential elements of right. The jury must be indifferent between the prisoner and the commonwealth, and to secure impartiality challenges are allowed, both for cause, and also peremptory, without assigning cause. The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit on his trial of his own good character and standing with his neighbors if these he has preserved, and also of such knowledge as the jury may possess of the witness who may give evidence against him. He will also be able with more certainty to secure the attendance of his own witnesses." Kirk v. State, 1 Cold. (Tenn.) 344; Armstrong v. State, Id. 338; State v. Denton, 6 Cold. (Tenn.) 539. This strong language is used in commenting upon the clause, which, in substantially the same terms, guaranties the right of trial by jury in all serious criminal prosecutions in every one of the states. * * *

After the federal Constitution had been ratified the people of the states, with the recollection of the flagrant invasions of their rights by transporting freeman abroad to be tried for "pretended offenses" still fresh, amended it so that, says Ordronaux, "the crime and its punishment are attached to the jurisdiction within which it was committed." Ordronaux, Const. Leg. 259; Const. U. S. art. 3, § 2, cl. 3. These amendments apply only to federal tribunals, but the fact that they were prohibited from trying, except in the state where the crime should be committed, is evidence of a purpose to put it beyond the power of congress to have a citizen tried for a criminal offense except by a jury of the vicinage, and at a point not so remote as to deprive him of the benefit of his witnesses. Another amendment (article 4, § 2, cl. 2) supplements that already referred to, and shows by its terms that the purpose in enacting it was to definitely localize the forum of every crime committed by a person not in the land or naval forces, by providing for the extradition of criminals on demand of the governor "to the state having jurisdiction of the crime."

It was evidently contemplated by the framers of the Constitution that ordinarily there would be but one state where a crime could be properly said to have been committed, and whose courts would have cognizance of it. It was natural that they should cling to the old territorial rule, which limited the jurisdiction to the courts of the county.

The state of South Carolina was the sovereign whose authority was disregarded when the bigamous marriage was celebrated. If the defendant married a second time in South Carolina or elsewhere outside of North Carolina, the act had no tendency at the time to affect society here, nor can that unlawful conduct be punished as a violation of our criminal laws. On the other hand, the completed act of entering into a second marriage in a neighboring state is not analogous to the cases where a mortal wound is inflicted in one state, and the wounded man lingers and dies from its effects within the limits of another state during the next ensuing 12 months. It is needless now to discuss the question whether, on account of the fact that the ultimate effect of the wound is the resulting death, the state in which the death occurs in such cases should not be held to have common-law jurisdiction to try for murder, since nearly all of the states have enacted statutes providing for such trials, and some of them have declared such enactments essential. Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89; Bishop, Crim. Law, §§ 112–117. * * *

The attempt to evade the organic law by making the coming into this state (after committing an offense in another) a crime is too palpable, in view of the admitted fact that the Constitution of the United States gives to citizens of all the states the immunities and privileges of its own citizens, and of their guaranteed right, under the interstate commerce clause, to pass through another state without arrest and inquiry into their accountability for offenses against their own sovereignty, but especially because the trial for the new felony involves an investigation of the original bigamy by a jury not of the vicinage and remote from the witnesses. * * *

Our statute applies by its terms as well to a citizen of another state, who in transitu affords to our local authorities the opportunity to apprehend him, as to those who become domiciled within our borders. Ordronaux, Const. Leg. pp. 339–343. As a citizen of another state, he has the privilege of demanding a trial in a particular locality, and by a jury of the vicinage; and it would deprive him of that right, guaranteed by the federal Constitution, to arrest him while temporarily in this state, and, under the pretense of punishing him for the felony of coming into the state after a bigamous marriage, try him remote from the locality where the marriage was celebrated and his witnesses reside for an offense involving only the question whether the second marriage was in fact bigamous. Ordronaux, supra, p. 255.

Wharton (2 Crim. Law, § 1685), after discussing the English statute, says: "In some of the United States a similar statute has been enacted; in others a continuance in the bigamous state is made indictable, no matter where the second marriage was solemnized. But, when the act of bigamous marriage is made the subject of indictment, then, at common law, the place of such act has exclusive jurisdiction."

The court of Alabama has expressly held in Beggs v. State, 55 Ala. 108, that where a person is indicted for the bigamous act of marrying a second time in another state, as distinguished from continuing to cohabit within the state after such marriage, the indictment could not be sustained; but the court did not find it necessary in that case to discuss the question of legislative power, as the Legislature had modified the English statute in the same way that it had been altered by law in Vermont, Massachusetts, Tennessee, Missouri, and other states. It will not be insisted that the courts of the state of Maine would have power to enforce a statute which provided for punishing with death any person who had committed murder in another state, and then gone within its limits, by apprehending a Texan, and requiring him to send to the banks of the Rio Grande for testimony to meet and refute that of a malignant neighbor who had followed him almost across the continent to wreak his vengeance.

If a state has the power to punish one caught within its borders as a felon for a bigamous marriage committed within another state, what is to prevent the trial of a citizen found in a neighboring state for a homicide, if the statute were broad enough to include murder as well as bigamy? if the statute made it a felony punishable with death to come into the state after committing murder in another? The assertion of such authority would jeopardize the security of every American citizen who ventured beyond the confines of the state in which he resided. The express provision for the extradition of criminals excludes the idea of trying them outside of the limits of the state where the offense is committed, even if there were no direct guaranty that they should not be subject to arrest and trial for offenses against their own sovereign, when beyond her limits.

The additional counts in which it is charged that the defendant, after the bigamous marriage in South Carolina, came into North Carolina, and cohabited with the person to whom he was married, cannot be sustained, because that offense is not covered by our statute. The North Carolina statute would, if enforced, subject him to indictment if he should come across the border and leave the woman behind. While we do not recognize the validity of marriages of parties when they leave the state for the purpose of evading a law which makes a marriage between them unlawful, and with the intent, after celebrating the rites in another jurisdiction, to return and live in this state (State v. Kennedy, 76 N. C. 251, 22 Am. Rep. 683), we have no express statute making such acts indictable as a felony, but only as a misdemeanor, where they live in adultery here (State v. Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599).

This fact is fatal to another count of the indictment. But we do not wish to be understood as questioning the power of the state to punish one of its citizens who goes out of the state with intent to evade its laws by celebrating a bigamous marriage beyond its jurisdiction, and returning to live within its borders. For the reasons given we think that there was no error in the judgment of the court below quashing the indictment; and it is affirmed.[6]

SIMPSON v. STATE.

(Supreme Court of Georgia. 1893. 92 Ga. 41, 17 S. E. 984.)

Indictment for assault to murder.

Lumpkin, J.[7] * * * Under the evidence introduced in behalf of the state, and which the jury evidently believed to be true, the accused shot twice at the prosecutor, intending the balls from the pistol used to take effect upon him. At the time of the firing the prosecutor was in a boat upon the Savannah river, and within the state of Georgia, and the accused was standing upon the bank of the river in the state of South Carolina. It was conceded that if either or both of the balls had struck the prosecutor an offense of some kind would have been committed in Georgia, upon the idea that the act of the accused took effect in this state; but it was contended that, inasmuch as the prosecutor was not struck, no effect whatever was produced in Georgia by the act in question.

This contention is not well founded in point of fact, for the evidence shows conclusively that, although the prosecutor was not injured, the balls did strike the water of the river in close proximity to him, within this state, and therefore it is certain that they took effect in Georgia, although not the precise effect intended, assuming that the verdict correctly finds it was the deliberate purpose of the accused to actually shoot at the prosecutor. What the accused did was a criminal act, and it did take effect in this state. Mr. Bishop says: "The law deems that a crime is committed in the place where the criminal act takes effect.

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[6] Shepherd, J., concurred in the conclusion. Merrimon, C. J., dissented. Contra: Rex v. Earl Russell, 20 Cox, C. C. 51 (1901). See, also, Hanks v. State, 13 Tex. App. 289 (1882).

[7] Part of this case is omitted.

Hence, in many circumstances, one becomes liable to punishment in a particular jurisdiction while his personal presence is elsewhere. Even in this way he may commit an offense against a state or county upon whose soil he never set his foot." 1 Bish. Crim. Proc. § 53. And see Bish. Crim. Law, § 110.

Of course, the presence of the accused within this state is essential to make his act one which is done in this state, but the presence need not be actual. It may be constructive. The well-established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. Thus, a burglary may be committed by inserting into a building a hook or other contrivance by means of which goods are withdrawn therefrom; and there can be no doubt that, under these circumstances, the burglar, in legal contemplation, enters the building. So, if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes. If an unlawful shooting occurred while both the parties were in this state, the mere fact of missing would not render the person who shot any the less guilty. Consequently, if one shooting from another state goes, in a legal sense, where his bullet goes, the fact of his missing the object at which he aims cannot alter the legal principle.

Cases are numerous in which it has been held that where a person wounds another in one state or country, but the person wounded dies elsewhere, beyond its territorial boundaries, the courts of the state or country in which death occurred have jurisdiction to try the offense. A leading case on this line is that of Tyler v. People, 8 Mich. 320, in which there was a dissenting opinion by Justice Campbell. The ruling of the majority of the court, however, was approved in the case of Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89.[8] Justice Gray, who delivered the opinion in the latter case, says, on page 7, that if one's "unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning, its continuance, or its result, is not essential. He may be held guilty of homicide by shooting, even if he stands afar off, out of sight, or in another jurisdiction"; and the words quoted are followed by apt illustrations. On page 17 of the same report Justice Gray disapproves the dissenting opinion of Justice Campbell above mentioned.

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[8] In Tyler v. People (1860) and Commonwealth v. Macloon (1869) the defendants were indicted under statutes providing for such trial in the state where the death occurred. In the absence of such a statute the court held, in State v. Carter, 27 N. J. Law, 499 (1859), that the defendant was not indictable in New Jersey, where his victim died, but only in New York, where the mortal wound was given. Where the question is not regulated by statute, or where the statute merely provides that offenses shall be tried in the county where the offense is committed, it is generally held that the indictment is properly brought in the state and county where the blow was struck. Green v. State, 66 Ala. 40, 41 Am. Rep. 744 (1880); U. S. v. Guiteau, 1 Mackey, 498, 47 Am. Rep. 247 (1882); State v. Bowen, 16 Kan. 475 (1886); State v. Kelly, 76 Me. 331, 49 Am. Rep. 620 (1884). In State v. Kelly, supra, the fatal blow was struck in a fort belonging to the United States in Maine, and the victim died outside of said fort. It was held that the state court had no jurisdiction of the offense.

There is, however, a clear distinction between cases like the one just cited, where a wound is inflicted in one jurisdiction and death ensues in another, and cases like the present, where the accused in one state puts in operation a force which takes effect in another. On page 343 of 8 Mich., supra, this distinction is clearly stated by Justice Campbell. He says the doctrine of constructive presence is not applicable to a case like that with which he was then dealing, and then uses the following language which sustains our ruling in the case at bar. Speaking of constructive presence, he says: "All that it amounts to is that the crime shall be regarded as committed where the injurious act is done. A wounding must, of course, be done where there is a person wounded, and the criminal act is the force against his person. That is the immediate act of the assailant, whether he strikes with a sword or shoots a gun; and he may very reasonably be held present where his forcible act becomes directly operative." This doctrine is supported by Rorer on Interstate Law, 241, 243, 244, citing Johns v. State, 19 Ind. 421, 423, 81 Am. Dec. 408. And see Whart. Confl. Laws, § 825, and notes on pages 717, 718; Whart. Crim. Law, §§ 278–280.

In Adams v. People, 1 N. Y. 173, it appeared that the accused forged a paper in Ohio, upon which he procured money in New York, through an innocent agent, without going into the latter state. He afterwards voluntarily went into that state, and was indicted and tried for the crime. It was conceded by both court and counsel that he was guilty of committing the crime in the state of New York, and the question upon which the case turned was simply whether or not, inasmuch as he owed no allegiance to that state, he could be tried and punished therein. In U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932, it appeared that a gun was fired from an American ship lying in the harbor of Raiatea, one of the Society Isles, by which a person on a schooner belonging to the natives, and lying in the same harbor, was killed; and it was held that the act, in contemplation of law, was done on board the foreign schooner, where the shot took effect, and that jurisdiction of the crime belonged to the foreign government, and not to the courts of the United States.

In Hawes on Jurisdiction (section 110) it is laid down that "a crime may be committed within the jurisdiction of a state, although the person committing it never was within its borders, if the act takes effect there." An interesting discussion pertinent to the question involved may be found in 6 Crim. Law Mag., beginning on page 155, in an article entitled "Dynamiting and Extraterritorial Crime." "A party who, in one jurisdiction, or in one county, may put in operation a force that does harm in another, may be liable in either for the offense." Brown, Jur. § 92. This section also contains numerous illustrations which are apt and pertinent. See, also, Reg. v. Rogers, 14 Cox, Cr. Cas. 22.

The above authorities demonstrate beyond question that a criminal act begun in one state and completed in another renders the person who does the act liable to indictment in the latter. In view of these authorities, there cannot in the present case be any doubt whatever that Simpson would have been indictable in Georgia if a ball from his pistol had actually wounded Sadler. That this would be true is too well established for serious controversy. The able and zealous counsel for the plaintiff in error candidly conceded that such would be the law, but contended that, as the balls "took no effect in Georgia," the entire act of the accused was committed in South Carolina, and that he really did nothing in this state.

We have endeavored to show that this contention is not sound. As we have already stated, the act of the accused did take effect in this state. He started across the river with his leaden messenger, and was operating it up to the moment when it ceased to move, and was, therefore, in a legal sense, after the ball crossed the state line, up to the moment that it stopped, in Georgia. It is entirely immaterial that the object for which he crossed the line failed of accomplishment. It having been established by abundant authority and precedent that in crime there may be a constructive as well as an actual presence, there can be, in a case of this kind, in which the act of the accused, when analyzed, is simply an attempt to unlawfully wound another by shooting, no rational distinction in principle, as to the question of jurisdiction, whether the attempt is successful or not. The criminality was complete, and the offense was perpetrated in Georgia, irrespective of results.

* * *

Judgment affirmed.[9]

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[9] Accord: State v. Hall, 114 N. C. 909, 19 S. E. 602, 28 L. R. A. 59, 41 Am. St. Rep. 822 (1894), where the court refused jurisdiction of defendant, who, standing in North Carolina, shot a person in Tennessee.

There being no common law of the United States as to crimes (see U. S. v. Coolidge, 1 Wheat. 415, 4 L. Ed. 124 [1816]; U. S. v. Worrall, 2 Dall. 384, 1 L. Ed. 426 [1798]), the federal courts have no jurisdiction to punish an act, unless such act is made a crime by the Constitution or by act of Congress. Congress has from time to time, under the power given it by the Constitution to create, define, and punish offenses whenever they shall deem it necessary for effectuating the objects of the government, enacted statutes punishing crimes against the United States and providing for the proper venue. If such statutes do not expressly or by implication make the crime exclusively cognizable in a federal court, and the same criminal act is also punishable by the laws of the state, the state in which the act was done has concurrent jurisdiction over the offense. Moore v. Illinois, 14 How. 13, 14 L. Ed. 306 (1843).

See, for jurisdiction of the United States Court for China, Biddle v. United States, 156 Fed. 759, 84 C. C. A. 415 (1907).

Const. art. 1, § 8, cl. 17, gives the right of exclusive legislation to the United States, to exercise authority over all places purchased by the consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. The federal courts have, therefore, exclusive jurisdiction over all crimes committed

CHAPTER II

VENUE

ROBBINS v. STATE.

(Supreme Court of Ohio, 1857. 8 Ohio St. 131.)

Bartley, C. J.[1] * * * The court was asked to instruct the jury that, to convict under this indictment, it must be proven that the offense was committed in Marion county, and that, if the accused gave the poison into the hands of the deceased in Shelby county, and she did not swallow it there, but carried it with her into Marion county, and there swallowed it, and became poisoned, the crime was committed, if committed at all, in Shelby, and not in Marion, county. The court refused to give this instruction, as asked, but did charge the jury that, before finding a verdict of guilty, they must be satisfied, from the proof, that the accused committed the act in Marion county, but that it was not necessary that they should find that he had been in Marion county, or had given the poison into the hands of the deceased in that county. It would be sufficient, to justify a conviction, if they found that the accused had furnished the poison to Nancy Holly in Shelby county, and that, before swallowing it, she had taken it with her and went into the county of Marion, and there swallowed the poison and died.

It is insisted that the court erred in this part of the instructions to the jury. To determine this, it becomes necessary to inquire what constitutes the act of "administering poison," within the meaning of the statute. If it consisted in simply giving or prescribing the poison, there would be great force in this exception. But the term "administer," as used in the statute, has acquired a legal signification, importing not simply the prescribing or giving of the drug, but directing and causing it to be taken. Webster, in his Dictionary (quarto), says that: "To administer medicine is to direct and cause it to be taken." The question as to the legal import of this term, in the criminal statute of England (9 Geo. IV, § 11), was presented in the case of Rex v. Cad-

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in such places, so purchased, in the absence of an express reservation of jurisdiction by the state Legislature (United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867 [1819]), or in lands ceded by a state to the United States without reservation of jurisdiction (United States v. Carter [C. C.] 84 Fed. 622 [1897]). But the purchase of such lands, without the consent of the state in whose territory they are, does not give the federal court jurisdiction over crimes committed in such lands. United States v. Penn (C. C.) 48 Fed. 669 (1880). And see In re O'Connor, 37 Wis. 379, 19 Am. Rep. 765 (1875).

[1] Part of this case is omitted.

man, wherein it was held that there was no administering unless the poison was taken into the stomach by the person to whom it was administered. Carr. Supp. 237. It is true Ryan & Moody have given a contradictory report of this decision. Rex v. Cadman, R. & M. C. C. Rep. 114. But Mr. Justice Park, who participated in the decision, took occasion to correct the mistake and affirm the correctness of Carrington's report of the case, in the decision of Rex v. Harley, 19 Eng. Com. Law Rep. 424, in which he said "that his note" (as well as his recollection) "of the case was that the judges were unanimously of opinion that the poison had not been administered, because it had not been taken into the stomach, but only into the mouth."

That the term has the same import in the criminal statutes of this state is manifest from the phraseology of the thirty-seventh section of the act for the punishment of crimes (Rev. St. Ohio, 275), which is as follows: "That if any person shall give any mortal blow, or administer any poison to another, in any county within this state, with intent to kill, and the party so stricken or poisoned thereof, shall afterwards die in any other county or state, the person giving such mortal blow, or administering such poison, may be tried and convicted of murder or manslaughter, as the case may be, in the county where such mortal blow was given, or poison administered." This provides for cases where, after the criminal act is fully consummated, the person receiving the mortal blow, or swallowing the poison, is enabled to go, and does go, into another county, or state, before death. It is not the place of the death, but the place where the criminal act is perpetrated or consummated, to which the jurisdiction to try the case is given. The language of the statute is, "and the party so stricken or poisoned thereof, shall afterwards die in any other county or state," etc.

The county to which the jurisdiction is given is the county in which the person is "poisoned thereof"; that is, of the administering mentioned. Now, the poison must be taken into the stomach before the person can be poisoned. So that the administering the poison is not consummated until the person to whom it is administered is poisoned. It is manifest, therefore, that the criminal act of administering poison is not consummated by simply prescribing or delivering the poison. It must be actually swallowed, or taken into the stomach, pursuant to the prescription or direction given, in order to constitute the overt act of administering poison. If the accused did prescribe and deliver the poison to Nancy Holly in Shelby county, yet as she did not take it, or swallow it, in that county, the criminal act was not complete in that county, but was consummated in Marion county, where Nancy was actually poisoned. Now, where a criminal act is commenced in one county, but consummated in another, the jurisdiction to try the offender is in the county where the criminal act is consummated, or becomes complete.

It is insisted that the accused had not been in Marion county, and that a person could not commit a crime in a county in which he had not been. Ordinarily this would be true, but it is not necessarily so. A person may commit a criminal act in a county, although he has never stepped a foot within its limits. If a person in Morrow county, near the line of Marion county, should, by firing a gun or hurling a bludgeon across the county line, unlawfully kill a person in Marion county, he might be guilty of a crime, and be amenable to a prosecution in the latter county, although he had never been within its limits.

There does not appear, therefore, to have been any error in the charge of the court on this point.

HASKINS v. PEOPLE.

(Court of Appeals of New York, 1857. 16 N. Y. 344.)

The prisoner was indicted, with four other persons, for grand larceny; the property alleged to have been stolen being money and bank notes, the property of David J. Shaw.

DENIO, C. J.[2] * * * As the stolen money was brought by the thieves into the county of Onondaga, the prisoner was legally indicted in that county. This has been the settled law from an early period. 3 Inst. 113; 1 Hale's P. C. 507; People v. Gardner, 2 Johns. 477. Even if the original taking had been in another state or country, and the felon had brought the stolen property into this state, he could now be indicted in any county into or through which he carried it. 2 Rev. St. 698, § 4; People v. Burke, 11 Wend. 129. No distinction arises out of the fact that a burglary was committed where the property was stolen, in Cayuga county. Burglary, when accompanied with larceny, is a compound offense. Under a count for the burglary the prisoner may be convicted of a simple larceny. At the common law the burglary could only have been prosecuted in the county where it was committed; but when accompanied with larceny the latter could be prosecuted in any county into which the prisoner took the stolen property. The same is true of robbery or other compound offenses. The principle is well illustrated in the following passage from Hale: "A. robs B. on the highway, in the county of C., of goods of only the value of twelve pence, and carries them into the county of D. It is certain that this is larceny in the county of D., as well as in the county of C.; but it is only robbery in the county of C., where the first taking was, and for robbery he cannot be indicted or apprehended in the county of D., but only in the county of C. But he may be indicted of larceny in the county of D., though the robbery were but of the value of one penny; yet if A. were indicted thereof in the county of C., he should have had judgment of death and been excluded from clergy." 1 Hale's P. C. 536. In these cases the indictment takes no notice of the county where the first taking was, the theory being that the legal possession of the goods remains in the true owner, and every moment's continuation of the trespass and felony amounts to a new caption and asportation. 1 Russ. on Crimes, 173; 2 Hale, 163; 1 Hawk. P. C. c. 33, § 52; 4 Bl. Com. 304; 2 East, P. C. 771, c. 16, § 156. The idea that, in cases of this description, the crime is considered as actually committed in the county where the offender is found with the goods, is very distinctly carried out in the case of Rex v. Parker, 1 Russ. 174. An indictment was found in Hertfordshire for stealing four live tame turkeys, and it appeared that they were stolen alive in Cambridgeshire, killed there, and carried dead into Hertfordshire; and, upon the point being heard, the judges held that, though the carrying into Hertfordshire constituted a larceny, yet it was a new larceny there, and a larceny of dead turkeys, and not of live ones.

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[2] Part of this case is omitted.

It was unnecessary, and I think it would have been erroneous, to have set out in the indictment the offense in Cayuga county. The courts in Onondaga county had no jurisdiction of that transaction, as a distinct offense. It was simply matter of evidence, to characterize what was done in Onondaga, and to show the quality of that act.

The prisoner might, under the statute, have been indicted in Onondaga for the burglary committed in Cayuga. 2 Rev. St. 727, § 50. In such a case, I think the indictment must have been special. The burglarious entry could not have been charged to have been made in Onondaga without a variance; and if it had stated it to have been made in Cayuga, according to the fact, without a statement that the property had been brought into Onondaga, it would have appeared that the courts of the latter county had no jurisdiction to try the offense.

The difference between the two cases is this: Burglaries may be tried out of their proper counties in certain special cases; that is, where the goods burglariously taken are carried into another county by the offenders. But this is by positive law, and not because the burglary was actually committed in the county where the indictment is found, or in judgment of law is considered to have been committed there. The fact must therefore be set out which brings the case within the statute; but in the case of an indictment for a simple larceny, found in a county into which the thief has carried the property stolen in another county, the law adjudges that the offense was in truth committed there, and hence there is no occasion for a statement in the pleading of what occurred in the other county. * * *

Judgment affirmed.[3]

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[3] In State v. McGraw, 87 Mo. 161 (1885), it was held that a law was unconstitutional which authorized a prosecution for burglary in a county other than that in which the burglary was committed, into which the goods acquired by the burglary were taken.

REGINA v. ROGERS.

(Court of Criminal Appeal, 1877. 14 Cox, Cr. Cas. 22.)

Case stated for the opinion of this court by the assistant judge of the Middlesex sessions.

At a general sessions of the peace for the county of Middlesex held at the Guildhall, Westminster, on the 7th day of June, 1877, the prisoner was tried on an indictment which charged him with having, when he was employed in the capacity of clerk or servant to Middleton Chapman and another, embezzled the sum of £10. 17s. 6d. received by him on their account.[4] * * *

FIELD, J. I also am of opinion that this conviction should be affirmed, and I have come to this conclusion on the ground that a material part of the offense was committed in the county of Middlesex. It was not the duty of the prisoner to remit the specific money which he had received, but it was his duty to remit that money or its equivalent at once to his employers; i. e., in the course of the week in which he received it. On the 18th day of April the prisoner received the money in question at York, and on the 19th and 20th the prisoner was at Hull, and wrote letters to his employers in London, saying nothing about the receipt of the money at York. Again on the 21st, when at Doncaster, he wrote a letter to his employers in London; and, in answer to a question left to them, the jury say that the prisoner intended that the prosecutors should understand from the statements in that letter that he had not then received the amount in question, and the prisoner had thus in effect rendered a willfully false account. Upon these facts the question arises whether any material part of this offense was committed in the county of Middlesex?

Starting with this, that the law presumes every man to be innocent till he is proved to be guilty, I am at a loss to find any evidence of the complete offense of embezzlement in Yorkshire, except the writing and posting there of the letters addressed to the prisoner's employers in Middlesex. On the authority of Evans v. Nicholson, 45 L. J. C. P. 111, note 4, which decided that a letter, in which the defendant admitted a debt and promised to pay it, addressed to and received by the plaintiff in the city of London, was evidence of an account stated in the city of London, I think that the letter of the 21st day of April, addressed to and received by the prosecutors, and intended to act on their minds, in Middlesex, was in effect an act done by the prisoner in Middlesex. The case to my mind is the same as if a man standing in one county with a long spear or a pistol kills or injures a man in the adjoining county, or as if a man with one leg in one county and one in another does a criminal act. So as to a letter posted in one county and received in another. There may have been evidence on which the prisoner might have been properly convicted in **Yorkshire**; but I am clearly of opinion that there was evidence which justified his conviction in Middlesex.

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[4] Part of this case is omitted.

In Rex v. Burdett, 4 B. & Ald. 95, which has been followed universally, the libel was contained in a letter written in county L., but received in county M., and it was held that the defendant might be indicted in either county. The case of Rex v. Taylor, 3 Bos. & Pul. 596, also makes the matter very plain. In that case the prosecutor's servant received 10s. for him in the county of Surrey, after which the same evening he returned to his master, in the county of Middlesex, who asked him if he had brought the money, and the prisoner said he had not, and that it had not been paid to him; and it was held that he was properly indicted in the county of Middlesex. Lord Alvanley, C. J., said: "The receipt of the money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into the county of Middlesex. It was not proved that the money was ever embezzled until the prisoner was in the county of Middlesex. * * * In such a case as this, even if there had been evidence of the prisoner having spent the money in Surrey, it would not necessarily confine the trial of the offense to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute until he was called upon by his master to account."

The act of nonaccounting is a continuing act, and extended in the present case to the time of the receipt of the prisoner's letter of the 21st day of April in the county of Middlesex. That was the first act from which it is possible to say with certainty that the prisoner intended to embezzle the money. Maule, J., put the matter in much the same way in Reg. v. Murdock [5 Cox, Cr. Cas. 362]: "It appears to me that there was evidence to go to the jury that the offense was committed when the prisoner met his master in Nottingham, and, being asked by him for the money, did not pay over the amount." I think, therefore, that the conviction should be affirmed.

Conviction affirmed.[5]

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[5] Kelly, C. B., and Lindley and Manisty, JJ., delivered concurring opinions, and Huddleston, B., a dissenting opinion.

By statute in some states embezzlement is indictable in any county into which the accused carries the property. See Pen. Code Cal., § 786; People v. Garcia, 25 Cal. 531 (1864); Brown v. State, 23 Tex. App. 214, 4 S. W. 588 (1887); Code Cr. Proc. Tex., art. 219.

At common law the receiver of stolen goods can be prosecuted only in the county where the goods were first received as stolen goods. Roach v. State, 5 Cold. (Tenn.) 39 (1867).

By statute in England, and in some states, the receiver of stolen goods may be prosecuted either in the county in which he first received the goods or in any county in which he at any time thereafter had them. 2 Russ. Cr. 238. See Wills v. People, 3 Parker, Cr. R. (N. Y.) 473 (1857); Moseley v. State, 36 Tex. Cr. R. 578, 37 S. W. 736, 38 S. W. 197 (1896). In the absence of a statute, the offense of obtaining goods by false pretense can be prosecuted only in the county where the goods were first obtained, not in the county

If a man were accessory before or after the fact in another county than where the principal felony was committed, at common law it was dispunishable, but now by the statute of 2 & 3 Edw. VI., c. 24, the accessory is indictable in that county where he was an accessory, and shall be tried there, as if the felony had been committed in the same county.

1 Hale, P. C. 623.

CARLISLE v. STATE.

(Court of Criminal Appeals of Texas, 1893. 31 Tex. Cr. R. 537, 21 S. W. 358.)

HURT, P. J.[6] * * * In the city of Denison, Grayson county, between the hours of 1 and 2 o'clock a. m. on the night of the 28th of April, 1892, while lying in bed with his wife and infant child, W.

where the false pretense was made (Connor v. State, 29 Fla. 455, 10 South. 891, 30 Am. St. Rep. 126 [1892]; Rex v. Buttery, cited in Reg. v. Ellis, [1899] 1 Q. B. 235); nor in a county into which the goods are afterwards carried (Reg. v. Stanbury, 9 Cox, C. C. 94 [1862]).

The proper venue in forgery is the county where the act of making or altering the instrument was done. Commonwealth v. Parmenter, 5 Pick. (Mass.) 279 (1827). And in uttering a forged instrument, the county in which the instrument was uttered. People v. Rathbun, 21 Wend. (N. Y.) 509 (1839). Where the forged instrument is sent by mail from the county where it was forged to another county where it is used to defraud, the weight of authority is that the proper venue of the uttering is the latter county, in the absence of a statute to the contrary (People v. Rathbun, 21 Wend. [N. Y.] 509 [1839]; State v. Hudson, 13 Mont. 112, 32 Pac. 413, 19 L. R. A. 775 [1893]), though some authorities are to the effect that the offense may be tried in the county where the letter was mailed (Perkin's Case, 2 Lewin, 150 [1826]).

For the venue in libel at common law and under statutes, see Commonwealth v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214 (1825); Rex v. Burdett, 4 B. & Ald. 95 (1820); U. S. v. Smith (D. C.) 173 Fed. 227 (1909). In bigamy: People v. Mosher, 2 Parker, Cr. R. (N. Y.) 195 (1855); Houser v. People, 46 Barb. (N. Y.) 33 (1866); State v. Hughes, 58 Iowa, 165, 11 N. W. 706 (1882); State v. Smiley, 98 Mo. 605, 12 S. W. 247 (1889). In attempts: Griffin v. State, 26 Ga. 493 (1858). Cf. State v. Terry, 109 Mo. 601, 19 S. W. 206 (1891). Robbery: Sweat v. State, 90 Ga. 315, 17 S. E. 273 (1892).

By St. 7 Geo. IV, c. 64, § 12 (1826), it is provided that, where any felony or misdemeanor shall be begun in one county and completed in another, it may be dealt with in any of the said counties in the same manner as if it had been actually and wholly committed therein. Similar statutes have been enacted in the United States. See Connor v. State, 29 Fla. 455, 10 South. 891, 30 Am. St. Rep. 126 (1892). Section 134 of the Code of Criminal Procedure of New York provides: "When a crime is committed, partly in one county and partly in another, or the acts or effects thereof, constituting or requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in either county." See People v. Mitchell, 49 App. Div. 531, 63 N. Y. Supp. 522 (1900). Affirmed in 168 N. Y. 604, 61 N. E. 182 (1901).

The Constitution of the United States provides as to crimes against the United States: "The trial of all crimes * * * shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." Article 3, § 2, cl. 3.

"Where a county is divided, a criminal act done before the division is to be prosecuted in the particular new county in which is the place of the offense." White, P. J., in Hernandez v. State, 19 Tex. App. 408 (1885).

[6] Part of this case is omitted.

T. Sharman was shot with a shotgun by some person standing upon a ladder placed against the house, shooting over the top of the window sash, which had been lowered about six inches. Charles Luttrell was indicted as principal, tried, and convicted of murder of the first degree with the death penalty, appealed to this court, and the judgment was affirmed. On May 25, 1892, John T. Carlisle was indicted, being charged as an accomplice, also, for the murder of W. T. Sharman, was on the 28th of October, 1892, tried and convicted of murder in the first degree, with the death penalty assessed against him also. From this conviction and judgment he appeals.

The acts constituting appellant an accomplice occurring in Collin county, counsel for appellant contends that Grayson county, the county of the homicide, was without authority to try the case. If an accomplice to a felony be guilty of a distinct offense from the felony committed by his principal, the position of counsel is well taken. We have no definition of a crime named or called "accomplice," but we are informed by our Code what acts and things will make a person doing them an accomplice to all felonies to which there can be an accomplice. We are aware that there are numerous opinions of learned courts strongly intimating that an accessory before the fact (our accomplice) is guilty of a distinct offense from that of his principal. We desire to notice the reason or legal ratiocination of these opinions.

The following proposition is supported by a strong line of authorities: Accessory before the fact in one state, to crime committed in another, cannot be punished in the state where the substantive crime is committed. The reasoning by which this proposition is sustained is that, as the acts constituting a person an accessory occurred in a state other than that in which the principal committed the crime, the state of the substantive crime cannot punish those acts or the perpetrators, because done beyond the jurisdiction of the state in which the crime is committed by the principal. Let us examine this subject, in the light of the same authorities which support the above proposition, a little further.

A. lives in Texas. He procures B., who also lives in Texas, to go to Missouri, and there commit an act which is a felony in Missouri. B. is innocent of anything wrong in what he does. These same authorities hold that Missouri would have authority to try and punish A. Upon what ground? Because A. would be the principal. Again. A. employs B. to go to Missouri, and there commit a misdemeanor. B., with full knowledge of the criminal intent of A., would be guilty as a principal; and, as it was a misdemeanor, all would be principals, and Missouri would have authority to punish A. when in fact A. had done no act whatever in Missouri, except through B. Again, A. sends B. to Missouri armed and equipped for the purpose of murdering C., being instigated thereto by A. Missouri would not have authority to try and punish A., because all of his acts were done in Texas, and because he was accessory and not principal. Now for the dilemma. Suppose Missouri should by statute make accessories before the fact principals, as several states have done, then she would have authority to try and punish A. for the murder of C when A. had done no act in Missouri personally, acting alone through his guilty agent, B.

What is the result of such doctrine? It is that the power or authority to punish acts committed beyond the border of the state, which are crimes within the state, depends upon technical distinctions between felonies and misdemeanors, accessories and principals, or whether the agent was guilty or innocent, and not upon the fact that the criminal act was or was not committed in the state.

There is another line of authorities resting upon solid foundation. The doctrine is this: That distinctions between accessories and principals rest solely in authority, being without foundation either in natural reason or the ordinary doctrine of law; for the general rule of law is that what one does through another's agency is to be regarded as done by himself. In this state there is no distinction between the punishment of an accomplice and a principal. Why? Because the crime is the same. In morals there are circumstances in which we attach more blame to the accomplice than to his principal; as, when a husband commands his wife, or master his servant, to do for his benefit a criminal thing, which in his absence is done reluctantly, through fear or affection overpowering a subject mind. That the crime committed by the accomplice is the same as committed by his principal is evident. This proposition rests upon solid legal ground. In 1 Broom. Leg. Max. (2d Ed.) 643, we find this maxim: "The principle of common law, 'qui facit per alium, facit per se,' is of universal application both in criminal and civil cases."

If appellant be guilty, of what offense is he guilty? He is guilty of murder of the first degree. Why is he guilty of murder of the first degree? Simply because he, with his malice aforethought, expressed through his agent and tool, Luttrell, killed W. T. Sharman. He is guilty because Luttrell's act was his act; Luttrell being his agent. Appellant is guilty of the murder of Sharman in Grayson county, though the acts constituting him an accomplice may have all occurred in Collin county. Why? Because, when his agent Luttrell shot and killed Sharman in the city of Denison, Grayson county, it was appellant, also, who, through Luttrell, shot and killed him in Grayson county.

The correctness of this doctrine is clearly supported in the death of Uriah, which was caused by David. The Lord, speaking through Nathan, said to David: "Wherefore hast thou despised the commandment of the Lord, to do evil in his sight? Thou hast killed Uriah, the Hittite, with the sword, and hast taken his wife to be thy wife, and hast slain him with the sword of the children of Ammon." Now, David was not present when Uriah was killed. David did not with his own hands slay Uriah with a sword, but when Joab placed Uriah in a position in which death was inevitable, and thereby had him killed, under the command of David, David killed Uriah with a sword just as if he had slain him with his own hands.

We are of opinion that the offense of the accomplice and his principal is the same, and, if at all, his crime was murder of the first degree committed in Grayson county, and hence the venue of the case was in Grayson county.

Some further observations on this subject. We desire to call attention to the very wise remark of Judge Marcy in People v. Mather, 4 Wend. (N. Y.) 229, 256 (21 Am. Dec. 122). He says: "Writers on criminal law make some difference between the offense of principal and accessory, but it is chiefly as to the order and mode of proceeding against them." By statute of New York it is provided that all suits, informations, and indictments for any crime or misdemeanor, murder excepted, should be brought within three years after its commission. The word "murder" was held to include as well accessories before the fact as principals. If an accomplice is guilty of a distinct felony from that of his principal, then a prosecution for being an accomplice to murder is barred by three years, for such an offense is not named in the statute regulating limitations.

The indictment is sufficient, and not obnoxious to the objections made to it. The evidence complained of, under the circumstances of this case, was admissible. The evidence amply supports the verdict. The judgment is affirmed. Judges all present and concurring.[7]

REX v. HARRIS.

(Court of King's Bench, 1762. 3 Burr. 1330.)

Mr. Stowe and Mr. Selwyn showed cause against the following rule, which had been made on the motion of Mr. Ashhurst, viz.:

"Wednesday next after fifteen days from the Holy Trinity, in the second year of King George the Third. City of Gloucester: The

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[7] See, also, People v. Wiley, 65 Hun, 624, 20 N. Y. Supp. 445 (1892). But see People v. Hodges, 27 Cal. 340 (1865); Commonwealth v. Pettes, 114 Mass. 307 (1873).

"The offense is compounded of the connivance of the accessory and the actual killing by the principal felon, and the crime of the accessory, though inchoate in the act of counseling, hiring, or commanding, is not consummate until the deed is actually done. The law in such case holds the accessory before the fact to be guilty of the murder itself, not as principal, it is true, but as accessory before the fact; for it is the doing of the deed, and not the counseling, hiring, or commanding, that makes his crime complete, and it is for the murder that he is indicted, and not for the counseling or procuring. We hold, therefore, that the locus in quo of the offense of an accessory before the fact to the crime of murder is the county in which the murder is done, and that the jurisdiction is there. * * * The crime of the accessory before the fact being only complete when the murder is done, the jurisdiction for his trial is where the murder is done. This is 'the county in which the crime was committed, in the sense of the Constitution.'" McWhorter, J., in State v. Ellison, 49 W. Va. 74, 38 S. E. 574 (1901).

King against Gabriel Harris and Two Others. Upon reading the affidavit of Thomas Rickstock and others, it is ordered that Tuesday next be given to the defendants, to show cause why this cause should not be tried at the next assizes to be held in and for the county of Gloucester, by a jury of the said county of Gloucester, instead of the city, upon notice of the said rule to be given to the said defendants in the mean time."

The affidavit, upon which the rule was obtained, went no further than to swear generally "that they verily believed that there could not be a fair and impartial trial had by a jury of the city of Gloucester," without giving any particular reasons or grounds for entertaining such a belief.

The cause to be tried was an information against the defendants (as aldermen of Gloucester) for a misdemeanor, in refusing to admit several persons to their freedom of the city, who demanded their admission, and were entitled to it, and, in consequence of it, to vote at the then approaching election of members of Parliament for that city, and whom the defendants did admit, after the election was over, but would not admit them until after the election, and thereby deprived them of their right of voting at it.

The prosecutors had moved for this rule, on a supposition "that the citizens of the city could not but be under an influence or prejudice in this matter," though there was, in fact, a list returned up to the proper officer of above six hundred persons duly qualified to serve on the jury. * * *

Mr. Justice WILMOT concurred. There was no rule better established, he said, than "that all causes shall be tried in the county, and by the neighborhood of the place, where the fact is committed." And therefore that rule ought never to be infringed, unless it plainly appears that a fair and impartial trial cannot be had in that county.

Where that does plainly appear, he said he had no doubt of the court's having power to depart from the general rule.

The case of The King against the Inhabitants of the County of Nottingham, in 2 Lev. 112, was a question upon the right of repairing a bridge. There the information brought against them for not repairing it was tried at the bar, by a Middlesex jury. That was done by consent; and it was a sort of civil right that was to be tried. However, if it be considered as a criminal case, all the inhabitants of the county were interested.

The true rule about suggestions entered upon the record is "that the facts proving that a fair and impartial trial cannot be had in the ordinary course must be themselves suggested upon the record." Whereas, here, it is only a conclusion without premises; it is only supposed, conjectured, "They verily believe" that there cannot be a fair and impartial trial by a jury of the city, nor, in the nature of the thing, can such a suggestion be credited. It does not follow that, because a man voted on one side or on the other, he would therefore perjure himself, to favor that party, when sworn upon a jury. God forbid! The freemen of this corporation are not at all interested in the personal conduct of these men upon this occasion. The same reasoning would just as well include all cases of election riots.

Therefore, though he had no doubt, he said, of the authority and jurisdiction of the court to award the venire into another county, upon a suggestion of facts clearly and fully proved to the court, showing "that a fair and impartial trial cannot be had in the county where the fact is laid," yet he was as clear that in this case there was no sort of foundation for such a suggestion being entered.

Per Cur'—unanimously.

Rule discharged.[8]

HEWITT v. STATE.

(Supreme Court of Florida, 1901. 43 Fla. 194, 30 South. 795.)

Mabry, J.[9] In October, 1898, plaintiffs in error, Dick Hewitt and Lum Hewitt, were indicted in Bradford county for the murder of J. T. Johnson, and plaintiff in error, Moss Hewitt, and one Minnie Hewitt, were jointly indicted with them as accessories before the fact of said murder. Upon a trial of the case in Bradford county in January, 1899, the jury acquitted Minnie Hewitt and disagreed as to the other defendants. The case came on for trial at another term of court in Bradford county, held in October, 1899, and after the exhaustion of two special venires, one for one hundred jurors and the other for twenty-five, and the issuance of another for thirty jurors, the court made the following order, viz.: "Came again the defendants, each in his own proper person and attended by his counsel, whereupon, it appearing to the court that a qualified jury cannot be obtained in this county to try said case, now, therefore, it is considered that said case be and the same is hereby transferred and the venue changed to the circuit court of Duval county for trial." The order further provided for the transmission of the necessary papers to Duval county. It appears from a transcript of the proceedings in Bradford county that, in addition to the regular panel of jurors for the terms when the indictment was found and when the mistrial occurred, a special venire of one hundred jurors was served for the last-mentioned term. When the court made the order changing the venue on the unsuccessful effort to obtain a jury, it appears that defendants neither requested it nor interposed any objections thereto.

The case came on for trial in Duval county without any objection on the part of defendants, and thereupon Dick Hewitt and Lum Hewitt were convicted of murder in the second degree, and Moss Hewitt was convicted of being accessory before the fact of said offense.

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[8] Part of this case is not reprinted. Mansfield, C. J., and Denison and Foster, JJ., delivered concurring opinions.

[9] Part of this case is omitted.

From the judgment of the court imposing the sentences of the law upon the defendants, writ of error has been sued out by them, and two grounds of error are presented for consideration, viz.: First, the court erred in changing the venue from Bradford county; second, Moss Hewitt should be discharged because under the laws of Florida a party cannot be convicted as being an accessory before the fact to murder in the second degree.

Our present Constitution (section 11, Declaration of Rights) declares that "in all criminal prosecutions the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed." This provision was not contained in the Constitution of 1868. Section 2358, Revised Statutes, provides that "all criminal causes shall be tried in the county where the offense was committed, except when otherwise provided by law." It is provided in section 2928, Revised Statutes, that "the judge of the circuit court may order a change of venue in all criminal cases, when he shall be satisfied that it is impracticable to get a qualified jury to try the same in the county in which the crime was committed," and the change hereby authorized may be ordered as provided in section 2929 "upon the application either of the prosecuting attorney or of the defendant upon affidavit setting forth the necessity for such change." By chapter 4394, laws 1895, it is enacted "that whenever it shall be made to appear to the satisfaction of the presiding judge of any of the circuit courts of this state that the venue of any cause, civil or criminal, then pending in such court, should for any of the grounds now prescribed by law be changed, it shall be in the power and discretion of such judge to change the venue of such cause, civil or criminal, as the case may be, from the circuit court of the county where such cause is at the time pending to the circuit court of any other county within the same circuit, but said judge shall not be compelled to transfer said cause to any adjoining county." Other provisions as to transfer of causes need not be mentioned.

The provision in our Constitution in reference to the right of trial by an impartial jury in the county where the crime is committed is an important one to the accused. At common law a defendant had a right to be tried in the county in which the offense was alleged to have been committed, where he was surrounded by the influences of a good character if he had established one, and where the witnesses were accessible for the purposes of a trial. If an impartial trial could not be had in such county, the practice was to change the venue to some other county where such trial could be obtained. The abuse of the right to change the venue to the detriment of the accused would be serious to him, and no doubt constitutional provisions like ours were designed to permanently secure this right of trial by an impartial jury in the county where the offense is alleged to have been committed.

Some courts have held that the guaranty is not only of an impartial trial, but also a trial in the county where the offense was committed, and that it was not competent for the Legislature to provide for a transfer to another county for any cause without the consent of the accused. Armstrong v. State, 1 Cold. (Tenn.) 337; Kirk v. State, Id. 344; State v. Knapp, 40 Kan. 148, 19 Pac. 728. Where a trial by an impartial jury can be secured in the county where the crime is committed the accused cannot be deprived of a trial there, even under sanction of legislative action. If he applied for a change of venue and it be granted on his request, it may very properly be said that he has waived the right and no question can arise in reference to it.

We do not think it was the purpose of the framers of the Constitution to force a trial in a county where an impartial jury cannot be had, as to do so would defeat the greater and more important right of a speedy and public trial by an impartial jury. State v. Miller, 15 Minn. 344 (Gil. 277). Our statute is comprehensive enough to authorize the court to direct a change of venue when an impartial jury cannot be secured in the county where the offense is alleged to have been committed, and limiting it to the impossibility of securing an impartial jury in that county, we think it is constitutional. It is not contended in this case that an actual necessity for the change did not exist when the order changing the venue was made. The only point of contention under this head is that the law authorizing the change was unconstitutional. The record clearly indicates that the trial court put the question of obtaining an impartial jury in Bradford county to actual test, and in such a case we do not conceive that the provision of our Constitution was intended as a barrier against the change. The act of the Legislature may and should have effect in so far as it does not conflict with the Constitution, and to the extent of authorizing a change under circumstances disclosed in this case we are of opinion that there is no conflict. Care should, however, always be exercised to avoid any deprivation of the right of the accused to his constitutional mode of trial in applications to change the venue without his consent. * * *

Finding no error in the points presented, the judgment must be affirmed; and it is so ordered.[10]

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[10] See, also, State v. Miller, 15 Minn. 344, Gil. 277 (1870). Contra, State v. Denton, 6 Cold. (Tenn.) 539 (1869); State v. Kindig, 55 Kan. 113, 39 Pac. 1028 (1895).

The matter of change of venue for prejudice in the county is now generally regulated by statute. Whether the application for such change shall be granted is usually made to rest in the sound discretion of the judge, to whom the application is properly made; and the exercise of that discretion will not be reviewed on appeal, unless it has been clearly abused. Smith v. State, 145 Ind. 176, 42 N. E. 1019 (1896); State v. Hawkins, 23 Wash. 289, 63 Pac. 258 (1900). For discretion of court, when the application is founded on prejudice of the judge, see State v. Hawkins, 23 Wash. 289, 63 Pac. 258 (1900); State v. Thomas, 32 Mo. App. 159 (1888); State v. Grinstead, 10 Kan. App. 78, 61 Pac. 975 (1900).

CHAPTER III

PROSECUTION

SECTION 1.—METHODS OF PROSECUTION

The next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation. And this is either upon a previous finding of the fact by an inquest or grand jury, or without such previous finding. The former way is either by presentment or indictment.

I. A presentment, generally taken, is a very comprehensive term, including not only presentments properly so called, but also inquisitions of office and indictments by a grand jury. A presentment, properly speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king; as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment before the party presented can be put to answer it. An inquisition of office is the act of a jury summoned by the proper officer to inquire of matters relating to the crown upon evidence laid before them. Some of these are in themselves convictions, and cannot afterward be traversed or denied; and therefore the inquest or jury, ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of felo de se; of flight in persons accused of felony; of deodands and the like; and presentments of petty offenses in the sheriff's tourn or courtleet, whereupon the presiding officer may set a fine. Other inquisitions may be afterwards traversed and examined, as particularly the coroner's inquisition of the death of a man when it finds any one guilty of homicide; for in such cases the offender so presented must be arraigned upon this inquisition and may dispute the truth of it, which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely.

II. An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things which on the part of our lord the king shall then and there be commanded them.

The remaining methods of prosecution are, without any previous finding by a jury, to fix the authoritative stamp of verisimilitude upon the accusation. One of these, by the common law, was when a thief was taken with the mainor; that is, with the thing stolen upon him in manu. For he might, when so detected flagrante delicto, be brought into court, arraigned and tried without indictment, as, by the Danish law, he might be taken and hanged upon the spot, without accusation or trial. But this proceeding was taken away by several statutes in the reign of Edward the Third, though in Scotland a similar process remains to this day. So that the only species of proceeding at the suit of the king, without a previous indictment or presentment by a grand jury, now seems to be that of information.

III. Informations are of two sorts: First, those which are partly at the suit of the king, and partly at that of a subject; and, secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer, and are a sort of qui tam actions (the nature of which was explained in a former book), only carried on by a criminal instead of a civil process, upon which I shall therefore only observe that, by the statute 31 Eliz. c. 5, no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the king and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offense; nor on behalf of the crown after the lapse of two years longer; nor, where the forfeiture is originally given only to the king, can such prosecution be had after the expiration of two years from the commission of the offense.

The informations that are exhibited in the name of the king alone are also of two kinds: First, those which are truly and properly his own suits, and filed ex officio, by his own immediate officer, the Attorney General; secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer, and they are filed by the king's coroner and attorney in the Court of King's Bench, usually called the master of the crown office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions, filed ex officio by his own Attorney General, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal, which power, thus necessary not only to the ease and safety but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations, filed by the master of the crown office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the Attorney General), but which, on account of their magnitude or pernicious example, deserve the most public animadversion.

4 Black. Comm. 301 et seq.

A second sort of proceeding in cases capital without indictment is where an appeal is brought at the suit of the party, and the plaintiff is nonsuit upon that appeal, yet the offender shall be arraigned at the king's suit upon such appeal.

2 Hale, P. C. 149.

Statute provided for indictment only except [illegible] punishment of indictable offenses in cities; but [illegible] of state [illegible] offense of selling liquor.

STATE v. ANDERSON.

(Supreme Court of New Jersey, 1878. 40 N. J. Law, 224.)

Beasley, C. J.[1] From the facts agreed upon, it appears that there are two indictments in the county of Passaic against the defendant: The one for the sale of ardent spirits without license, and the other for keeping a disorderly house, by frequently selling therein ardent spirits contrary to law. Both offenses were committed in the city of Paterson, in which city there was, at the time in question, an ordinance forbidding the keeping of a disorderly house within the city, under a penalty of $25.

By the act approved March 26, 1874 (Rev. St. 1874, p. 493), it is declared that the provisions of the thirty-seventh section of the act concerning inns and taverns, and those of the supplements thereto, approved respectively March 8, 1848, and February 20, 1849, which are the clauses making it an indictable offense to sell ardent spirits without license, shall not thereafter apply to offenses committed in any of the incorporated cities of this state, the ordinances of which shall provide for the punishment of the unlicensed sale of spirituous liquors, and for the punishment of the same on Sunday. The second section of the same statute enacts that, where the ordinances of such cities provide for the punishment of the offense of keeping a disorderly house, it shall not thereafter be lawful to prosecute, by indictment, any person accused of keeping a disorderly house in such city, where the alleged offense consists only of the continuous or frequent violation of the provisions of the laws above mentioned inhibiting the sale of ardent spirits by unqualified persons. * * *

Is the act constitutional? The keeping of a disorderly house is a crime indictable at common law, and in this state it is punishable by fine and imprisonment in the state prison. Therefore it is clear that if this offense can, for the purpose of crimination, trial, and punishment, be put into the hands of these municipal authorities, it follows that all common-law offenses of the same grade can be, in like manner, so deposited. This, I think, cannot be conceded. Such an arrangement would, in a very plain way, infringe an important provision of the Constitution of this state. Article 1, § 9, of that instrument declares that "no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace," etc. The purpose of this clause was to prevent the bringing of any citizen under the reproach of being arraigned for crime before the public, unless, by a previous examination taken in private, the grand inquest had certified that there existed some solid ground for making the charge. It took from the law officer of the state, the Attorney General, one of the established prerogatives of his office—that of filing his information against supposed offenders, and thus putting them on trial at his own volition. The reputation of every man was thus put under the care of a single specified body. The language of the constitutional clause is very comprehensive, and the specified exceptions show conclusively that it was intended to cover the residue of the entire field of criminal accusation. In the presence of such a prohibition, how then is it permissible to put a man on trial before a city court, charged with this common-law offense, without the preliminary sanction of a grand jury? If it be said the punishment is only a fine, the answer is: The restraining clause in question has nothing to do with the result or effect of the trial, its object being to save from the shame of being brought before the bar of a criminal court, except in the authorized method after an antecedent inquisition. I am clearly of opinion that a trial of a person for this offense before the municipal court would be an act utterly void.

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[1] Part of this case is omitted.

This conclusion also has led me to the further result that the clause of the statute in question must be held to be a nullity. The declaration that was intended to prohibit the trial of the offense of keeping a disorderly house by an indictment is too dependent on the establishment of another mode of trial and punishment to permit it to stand as an independent provision. The repeal of the old method of prosecution, and its substitute, are part of a scheme, and, as the scheme fails, the entire section must fail. The present indictment for this crime is sustainable.

With regard to the other indictment, the questions involved are of a different character. The offense of selling liquor without a license is a purely statutory offense. Independently of a prohibition by the Legislature, such a sale is neither immoral nor illegal, and the lawmaker, therefore, can put it under such control as may be thought best. Not being in its nature an indictable offense, it can be made punishable by a penalty, without indictment. Such is the effect of the present law in certain localities, and I can perceive nothing unconstitutional or illegal in such an arrangement. This law, therefore, which gives the exclusive right of prosecution and punishment to the city of Paterson in this case, is valid and must be sustained.

The sessions should be advised accordingly.[2]

RESPUBLICA v. GRIFFITHS.

(Supreme Court of Pennsylvania, 1790. 2 Dall. 112, 1 L. Ed. 311.)

Leave having been granted, on the motion of Serjeant, to file an information against the defendant, one of the justices of the peace for Chester county, it became a question whether the information should be drawn, filed and prosecuted by the Attorney General, or by the party at whose instance it was awarded.

The Attorney General (Bradford) objected that it is not the duty of the Attorney General to draw and file this information. It must, indeed, be in the name of the commonwealth, and the prosecutor may make use of the name of the officer, who prosecutes for the state. But there is in England a known and established distinction between informations filed by the Attorney General, and those filed by him at the relation of a private person, in the name of the master of the crown office. The former are always filed ex officio; and the court will not, upon motion of the Attorney General, give him leave to file an information against any person. 3 Burr. 1812.[3] They cannot be quashed on motion of the prosecutor. Doug. 227. Nor is the prosecutor liable for costs. But informations, at the relation of private persons, are in a great measure private suits. They are moved for and conducted, not by the officers of the crown, but by counsel employed by the prosecutor. The prosecutor is, in many cases, liable to costs. 3 Burr. 1270, 1305. The court will not grant it where the prosecutor appears unworthy. Burr. 548, 869. And on a motion for an information for a libel, oath must be made of the falsity of the charges contained in the libel, a circumstance quite immaterial, where the prosecution is wholly on the part of the public. The prosecutor, therefore, ought to be at the expense and employ his own counsel, in this proceeding, in which he is really interested. If it be the duty of the Attorney General to file this information, it is his duty to prosecute it also.

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[2] See, also, Natal v. Louisiana, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288 (1891).

"When the punishment will be only an amercement, the presentment is treated, not as an accusation, but as testimony, and conclusive testimony. We believe that in Henry III's day anything that we could call a trial of a man upon an indictment for misdemeanor was exceedingly rare." Pollock and Mait. Hist. Eng. Law, II, 649.

[3] Because such leave is not necessary, the Attorney General having himself power to exhibit such information. Rex v. Phillips, 4 Burr. 2089 (1767).

No informations (except those qui tam) have hitherto been filed in Pennsylvania; and it is of consequence to settle this point. No fees are provided for the duty in the bill of fees, and the Attorney General ought not, on this occasion, to be considered as the ~~mere~~ drawer of an information, for which he is not to be paid, and with the future prosecution of ~~which he has~~ nothing to do.

By THE COURT. The objection is reasonable and just. But, pro forma, the Attorney General ~~must allow his name to be~~ used by the prosecutor.

STATE v. KELM.

(Supreme Court of Missouri, 1883. 79 Mo. 515.)

PHILLIPS, C.[4] This ~~is a prosecution~~ for petit larceny, instituted in justice~~'s court on the affidavit of a private citizen~~. On a trial had therein the defendant was fined $1. From this judgment he appealed to the circuit court, where, on a trial de novo, he was again found guilty and fined $10. The circuit court sustained a motion in arrest of judgment for certain defects in the proceedings unnecessary to particularize, as our decision is placed upon other grounds fatal to the proceeding. The state has brought the case here on appeal.

Section 12, art. 2, of the state Constitution declares that "no person shall, for felony, be proceeded against criminally otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; in all other cases offenses shall be prosecuted criminally by indictment or information as concurrent remedies."

In Ex parte Slater, 72 Mo. 102, this court held that the word "indictment," as used in said section, "has a well-defined meaning, and must be accepted and understood as having been inserted in the Constitution with the meaning attached to it at common law." The court then quoted from Bacon's Abridgment and other common-law text-writers to show what were the qualities and incidents of an indictment as employed in the ancient proceedings.

This being unquestionably a correct construction of the term "indictment" as used in the Constitution, it must follow that the term "information," as employed in the same section, should be subjected to the same common-law meaning. The text-books are uniform in defining an information to be an accusation or complaint exhibited against a person for some criminal offense, "either immediately against the king or against a private person, which, from its enormity or dangerous tendency, the public good requires should be restrained and punished, and differs principally from an indictment in this: That an indictment is an accusation found by the oath of twelve men, whereas an information is only the allegation of the officer who exhibits it. 5 Bacon's Abr. pp. 167, 170, 172; Hawk. P. C. 26, § 4.

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[4] Part of this case is omitted.

The information at common law was uniformly exhibited by the Attorney General in certain cases, but at his discretion, except, perhaps, where directed by the House of Lords or House of Commons, or some of the high officials, as the lords of the treasury, etc. The king's coroner and attorney in the Court of King's Bench, called the crown officer, might file informations. This he might do, and usually did, at the prompting of some private individual. But no private citizen could beget a criminal prosecution on his mere affidavit or information.[5] 1 Bishop, Crim. Proc. (3d Ed.) 141, 143; Jacob's Law Dict. title "Information." Bishop (section 144) says: "In our states the criminal information should be deemed to be such, and such only, as in England is presented by the Attorney or the Solicitor General. This part of the English common law has plainly become common law with us. And as with us the powers, which in England are exercised by the Attorney General and Solicitor General, are largely distributed among our district attorneys, whose office does not exist in England, the latter officers would seem to be entitled, under our common law, to prosecute by information as a right adhering to their office, and without leave of court." Wharton lays down the same doctrine. Crim. Pr. and Pr. (8th Ed.) § 87.

So jealous were the English people, from whom comes our common-law heritage, of their personal liberty and the protection of due process of law, that they contended for a time earnestly against the summary proceeding by information as violative of the Magna Charta, and threw around its exercise many safeguards against abuses. If reasons were necessary to justify the conclusion reached in this opinion, they are numerous why no such right should be intrusted to a private citizen to inaugurate a proceeding like this upon his own affidavit. The injustice and abuse of such process, left at the caprice, spite, or malice of one not under the sanction of official duty, is apparent, and therefore the framers of the Constitution employed the term "information," without more, well understanding its common-law import and meaning. And we are not authorized, nor is the Legislature, to extend its meaning and use. * * *

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[5] "Informations at common law (which are very ancient in this court) were filed by the coroner, who did it upon any application, as a matter of course. The statute of 4 W. & M. c. 18, was therefore made to limit it, and other grounds there are by which the court has limited itself." Mansfield, C. J., in Rex v. Robinson, 1 W. Black. 541 (1765).

The proceeding in question should have been dismissed; but, as the court below arrested the judgment, its judgment will be affirmed, and the prosecution dismissed. All concur.[6]

SECTION 2.—LIMITATION OF PROSECUTION

With regard to limitations as to time, it is one of the peculiarities of English law that no general law of prescription in criminal cases exists amongst us. The maxim of our law has always been, "Nullum tempus occurrit regi," and, as a criminal trial is regarded as an action by the king, it follows that it may be brought at any time.
2 Stephen's Hist. Crim. Law, 1.

STATE v. DRY FORK R. CO.

(Supreme Court of Appeals of West Virginia, 1901. 50 W. Va. 235, 40 S. E. 447.)

Brannon, P.[7] The Dry Fork Railroad Company, having been convicted in the circuit court of Randolph county by the verdict of a jury of obstructing a public highway by maintaining a bad crossing where the railroad crossed the public highway, has brought this writ of error. * * *

I think the verdict could not be set aside on the ground that the obstruction was not proven to have been within a year before the indictment. It is fairly shown that the obstruction continued up to a year before the indictment. It may have begun longer back than a year, but that makes no difference, if it continued within such year; for every day's continuance of a public nuisance is a fresh offense. 1 Wood, Nuis. 457; City of Valparaiso v. Moffitt, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522, 528; 1 Bish. New Cr. Law, § 433 (3).

I cite 2 Whart. Cr. Law, § 1473, as additional authority to show the very evident proposition that, "to sustain an indictment for nuisance in obstructing a road, the road must first be shown to be public, and not private."

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[6] Accord: State v. Dover, 9 N. H. 468 (1838).
In some jurisdictions that permit prosecution by information, statutes require that no such information shall be filed until the accused shall have had a preliminary examination before an examining magistrate or officer, unless accused is a fugitive from justice or waives the examination. See Washburn v. People, 10 Mich. 372 (1862).

[7] Part of this case is omitted.

For want of evidence required by our state authorities as to this point, we must reverse the judgment, set aside the verdict, and remand the case for a new trial.[8]

STATE v. LANGDON.

(Supreme Court of Indiana, 1902. 159 Ind. 377, 65 N. E. 1.)

DOWLING, C. J. Prosecution by affidavit and information for a violation of the following statute: "Whoever, without cause, deserts his wife, child, or children, and leaves such wife, or her child, or children, a charge upon any of the counties of this state, or without provision for comfortable support, shall be fined not more than one hundred dollars, nor less than ten dollars." Burns' Rev. St. 1901, § 2254 (Rev. St. 1881, § 2133; Horner's Rev. St. 1901, § 2133). The affidavit and information were filed May 17, 1902. The charge set forth in each is that the appellee on July 28, 1894, at Knox county, Ind., without cause, deserted his wife leaving her without provision for comfortable support; that the appellee and his said wife thereafter remained residents of said county; and that such desertion continued until the filing of the affidavit and information. A motion by appellee to quash the affidavit and information was sustained, and, by the judgment of the court, the appellee was discharged. The state appeals, and the errors assigned and discussed are the rulings of the court upon the motion to quash each count of the affidavit and information.

The point made by the appellee upon the motion to quash and in this court is that the affidavit and information show upon their face that the supposed offense was committed more than two years before the filing of the affidavit and information, and therefore was barred by the statute of limitations. Burns' Rev. St. 1901, § 1665 (Rev. St. 1881, § 1596; Horner's Rev. St. 1901, § 1596). Counsel for the state contend that the offense charged was a continuing one, and that upon a proper construction of the statute the prosecution could be commenced at any time while the desertion lasted. To desert is to forsake or abandon with the intention of not returning, and, under section 2254, supra, the crime consists in forsaking the wife under certain conditions, which are particularly named in the statute. The desertion must be without cause, and the wife must be left a charge upon some county of this state, or without provision for comfortable support. Unless these conditions exist at the very time the husband deserts his wife, the criminal offense defined in section 2254, supra, is not committed. If the husband deserts his wife upon a sufficient legal cause—for example, habitual drunkenness—and she afterwards reforms, then, although he still refuses to live with her and maintain her, he cannot be convicted under the statute making desertion a crime. Or if he abandons her without cause, but with provision at the time for her comfortable support, he is not subject to indictment for such desertion, although the provision for her comfortable support subsequently fails.

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[8] Accord: State v. Gilbert, 73 Mo. 20 (1880). See, also, State v. Sloan, 55 Iowa, 217, 7 N. W. 516 (1880), bigamous cohabitation.

The criminal offense created by section 2254, supra, is not to be confounded with the violation of the civil obligation to live with, and to make reasonable provision for, the support of the wife. The latter is a continuing duty, which exists, with few exceptions, as long as the relation of husband and wife remains. The natural and probable defenses to an indictment or information for the criminal desertion of a wife are that the husband did not forsake her, or that he had sufficient cause for so doing, or that he did not leave her a charge upon any county in this state, or without provision for support. If, after five, ten, or twenty years, the husband might be indicted for leaving his wife, proof of the fact that he had lived apart from her and failed to support her would be easy; but proof of the cause for which he abandoned her, or of the conditions existing at that time, might be difficult or impossible.

In U. S. v. Irvine, 98 U. S. 450, 25 L. Ed. 193, the defendant was indicted for withholding from his principal and client pension money collected by him for her under the pension laws of the United States. The money was demanded by the client December 24, 1870. The indictment was found September 15, 1875. It was held that the prosecution was barred by the statute of limitations of two years. In the course of the opinion in that case, Miller, J., said: "But whatever this may be which constitutes the criminal act of withholding, it is a thing which must be capable of proof to a jury, and which, when it once exists, renders the party liable to indictment. There is in this but one offense. When it is committed the party is guilty, and is subject to criminal prosecution; and from that time, also, the statute of limitations applicable to the offense begins to run. It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when, perhaps, the pensioner is dead. But the fact of his receipt of the money is matter of record in the pension office. He pleads the statute of two years—a statute which was made for such a case as this; but the reply is: 'You received the money. You have continued to withhold it these twenty years. Every year, every month, every day, was a withholding, within the meaning of the statute.' We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the statute of limitations begins to run against the prosecution."

Not only would the defendant be placed at an unfair disadvantage if the offense is held to be a continuing one, and therefore not barred by the statute, but he would be liable to successive prosecutions as long as the abandonment continued. Another result of the construction asked for by the state is that the act of desertion, though not criminal at the time it occurred, might afterwards become criminal because of a change in the financial circumstances of the wife or child. We cannot believe that the Legislature intended these consequences.

There is no similarity between the offense created by section 2254, supra, and the misdemeanor of creating a public nuisance, such as the obstruction of a highway. In the former case the crime consists of a single completed act, committed under certain specific conditions. In the latter the maintenance of the nuisance is a crime, which the law forbids and punishes. If the statute under review, instead of making the desertion of a wife or child a criminal offense, had declared that a failure to make reasonable provision for these persons should be a crime, and punishable as such, then a failure to make such provision without reasonable excuse would be a continuing offense, and it would be contemporaneous with the continuance of the relations mentioned in the statute.

The criminal offense is against the public, and not against the deserted wife or child. It consists in conduct which the law deems pernicious to the public morals, and likely to subject the county to charges for the maintenance of the deserted wife or child. If innocent when it occurs, it cannot afterwards become criminal. If subject to prosecution as soon as committed, the statute begins to run against it at that time. None of the decisions in civil cases, where the action was for the maintenance of a wife or child, applies here, for the reason that the obligation of the husband and father to support his wife and child exists and continues until suspended or discharged by law, while the crime of desertion is a single act, defined by the statute, and capable of being committed only under the circumstances therein described.

Our construction of section 2254 is sustained by the language of the court in State v. Rice, 106 Ind. 139, 5 N. E. 906, where it is said that: "The penalty of the statute is denounced against the husband or father who, without cause, deserts and leaves his wife, child, or children without provision for comfortable support. Where, however, the wife, child, or children are, at the time of such desertion, left with a comfortable support, whether such provision was made by the husband or father or is possessed in the right of the wife, child, or children, the desertion is not criminal within the statute."

We find no error in the rulings of the court in quashing the information. Judgment affirmed.[9]

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[9] Accord: Bigamy, Gise v. Commonwealth, 81 Pa. 428 (1876).

In homicide, the statute begins to run from the date of the death, not the date of the blow. State v. Taylor, 31 La. Ann. 851 (1879). In obtaining property by false pretense, from the date the property was actually obtained, not the date on which the pretense was made. State v. Riley, 65 N. J. Law, 192, 46 Atl. 700 (1900). In conspiracy, the cases are not in accord. See U. S. v. McCord (D. C.) 72 Fed. 159 (1895); Commonwealth v. Bartilson, 85 Pa. 482 (1878); Ochs v. People, 124 Ill. 399, 16 N. E. 662 (1888).

COMMONWEALTH v. DUFFY.

(Supreme Court of Pennsylvania, 1881. 96 Pa. 506, 42 Am. Rep. 554.)

Mr. Justice GREEN.[10] * * * The next and most important question is as to the effect of the act of 1877 upon a case where the forgery was a misdemeanor, and the two-year limitation had not expired at the time of its passage.[11] Such is the present case, and it presents this exact question. The learned judge of the court below held that to apply the law to a case in which the offense had been previously committed would make it retroactive, and, as it related to a criminal subject-matter it would be an ex post facto law, and therefore void under both the federal and state Constitutions. If this view of the case were correct, the conclusion of the court below, that the case was subject only to the two-year limitation, would be right, and we should be obliged to affirm the judgment. But we are quite unable to agree with the reasoning of the learned judge on this subject, and have therefore reached a different conclusion. The language of the act of 1877 is as follows: "That hereafter the offense of forgery, whether the same be a misdemeanor or a felony, shall not be held barred by the statute of limitations when the indictment therefor shall have been brought or exhibited within five years next after the offense shall have been committed." * * *

It is argued by the learned judge that the act is ex post facto if applied to past offenses, and he bases his reasoning upon the very precise and comprehensive definition given by the present Chief Justice in his valuable edition of Blackstone's Commentaries (volume 1, p. 47). That definition is as follows: "An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Every law that makes an act done before the passing of the law, and which was innocent when done, criminal, or which aggravates a crime and makes it greater than it was when it was committed, or which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed, or which alters the legal rules of evidence, and makes less or different testimony than the law required at the time of the commission of the offense sufficient in order to convict the offender, falls within this definition."

The learned judge of the court below argues that it would be altering the legal rules of evidence to apply the new bar of five years to a case which was only subject to the bar of two years when the offense was committed. The reasoning is that the commonwealth in the one case would be required to prove that the offense was committed within two years, and in the other within five years, and, because five years are more than two, "the testimony required of the commonwealth in the former case is less than in the latter." This argument assumes that there is something more to be proved than the commission of the offense. But it will be seen at once that, whether the bar be five years or two years, the proof of the commonwealth is precisely the same in either case. The period of limitation is not a subject of proof at all. The commonwealth proves that the offense was committed, giving the circumstances in evidence, and necessarily, as a part of the factum, the time when it was committed. If, then, it happens that the law interposes a bar to a conviction if the offense was committed more than two years before the finding of the indictment, and such was the fact in a given case, there can be no conviction. But, if the bar were five years, the freedom from conviction would not arise till after five years had elapsed. In each case the actual proof is precisely the same. The commonwealth proves no more and no less in one case than in the other. Hence both the quantum of proof and the rules of evidence are the same in both cases, and there is no change in these respects in changing the time of the bar.

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[10] Part of this case is omitted.

[11] The act of 1860 (P. L. p. 450, § 77) limited the time of prosecution to two years.

At the time the act of 1877 was passed, the defendant was not free from conviction by force of the two years' limitation of the act of 1860. He therefore had acquired no right to an acquittal on that ground. Now an act of limitation is an act of grace purely on the part of the Legislature. Especially is this the case in the matter of criminal prosecutions. The state makes no contract with criminals, at the time of the passage of an act of limitation, that they shall have immunity from punishment if not prosecuted within the statutory period. Such enactments are measures of public policy only. They are entirely subject to the mere will of the legislative power, and may be changed or repealed altogether, as that power may see fit to declare. Such being the character of this kind of legislation, we hold that, in any case where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against ex post facto laws. A law enlarging or repealing a statutory bar against criminal prosecutions may, therefore, apply as well to past as to future cases if its terms include both classes. Such legislation relates to the remedy only, and not to any property right or contract right.

The act of 1877 in the present case was legally operative to enlarge the period of limitation as to the defendant; he having acquired no right of acquittal by virtue of the previous limitation at the time of the passage of the act. It follows from these considerations that the learned judge of the court below was in error in entering judgment in favor of the defendant on the point reserved, and in arresting the judgment. That retroactive legislation is not necessarily unconstitutional, especially where it only affects remedies, has been so many times decided that a mere reference to some of the authorities will be sufficient: Satterlee

v. Matthewson, 16 Serg. & R. 169; Hepburn v. Curts, 7 Watts, 300, 32 Am. Dec. 760; Kenyon v. Stewart, 44 Pa. 179; Schenley v. Commonwealth, 36 Pa. 29, 78 Am. Dec. 359; Waters v. Bates, 44 Pa. 473.

Judgment reversed, and record remanded, with this opinion, setting forth the cause of reversal, to the court of quarter sessions of Crawford county for further proceedings.

Statutes of limitation are generally held not to apply to crimes committed before the statute was enacted. People v. Lord, 12 Hun (N. Y.) 282 (1877). Contra: Commonwealth v. Hutchinson, 2 Pars. Eq. Cas. 453 (1850).

The defense of the statute, it is generally held, is permissible under the general issue (State v. Carpenter, 74 N. C. 230 [1876]; Commonwealth v. Ruffner, 28 Pa. 259 [1857]; Thompson v. State, 54 Miss. 740 [1877]), but must be pleaded before conviction, or else it will be taken as waived (State v. Thrasher, 79 Me. 17, 7 Atl. 814 [1887]; Johnson v. U. S., 3 McLean, 89, Fed. Cas. No. 7,418 [1842]), at least unless it appear on the face of the indictment that the offense was barred by the statute and none of the exceptions provided in the statute to prevent its operation are alleged therein (McLane v. State, 4 Ga. 335 [1848]). Statutes generally contain a proviso that the statute shall not apply where the person flees the jurisdiction. See cases supra.

CHAPTER IV

ARREST

SECTION 1.—WHAT CONSTITUTES ARREST

An arrest is the apprehending and first restraining of a man's person, depriving it of his own will and liberty, and may be called the beginning of imprisonment.

Dalton's Country Justice, c. 118.

RUSSEN v. LUCAS, Sheriff, et al.

(Court of King's Bench, 1824. 1 Car. & P. 153.)

Action against the sheriff for an escape. The only point in dispute was whether a person named Hamer was arrested by the sheriff's officer and escaped.

The officer having the warrant went to the One Tun tavern in Jermyn street, where Hamer was sitting. He said, "Mr. Hamer, I want you." Hamer replied, "Wait for me outside the door, and I will come to you." The officer went out to wait, and Hamer went out at another door, and got away.

Abbott, C. J. Mere words will not constitute an arrest; and if the officer says, "I arrest you," and the party runs away, it is no escape; but if the party acquiesces in the arrest, and goes with the officer, it will be a good arrest. If Hamer had gone even into the passage with the officer, the arrest would have been complete: but, on these facts, if I had been applied to for an escape warrant I would not have granted it.

Nonsuit.[1]

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[1] See, also, Baldwin v. Murphy, 82 Ill. 485 (1876).

In Grosse v. State, 11 Tex. App. 364 (1882), the marshal who had taken the prisoner in charge testified that he took charge of the prisoner in his capacity of marshal, but that he did not consider the prisoner under arrest. The court said: "The question is not so much the intentions and opinions of the marshal in regard to the matter, but the actual situation of the defendant; and he was not only in actual but intentional arrest."

REGINA v. NUGENT.

(Dundalk Spring Assizes, 1868. 11 Cox, Cr. Cas. 64.)

The prisoner was indicted for that he, being lawfully in custody under a warrant of the Lords Justices of Ireland, unlawfully did escape out of the said custody. * * *

BATTERSBY, J. * * * Evidence was given that two policemen had gone up to the prisoner's house, and had met him in the yard, and asked him to come into the parlor. On going in, they said the sub-inspector of police wanted to see him. The prisoner asked what he wanted. They said he would tell him himself when he came. He asked, "Am I to consider myself under arrest?" They said he might. They did not, however, tell him there was a warrant for his arrest. One of the policemen then went away, and the other remained in the room with the prisoner. The prisoner asked if he might go into the next room for his dinner. The policemen said, "No" but that he might have his dinner brought in there. Shortly after, Sub-Inspector Gardiner came in. He held the warrant in his hand, and said to the prisoner that this was a warrant for his arrest. He did not read it, nor touch the prisoner. The prisoner said, "Is my name in it?" and came forward, as though to look at the warrant, turned the key in the door, and leaped out of the window. He was not arrested till nearly one year and a half afterwards.

Sub-Inspector Gardiner admitted, on cross-examination, that the movements of the prisoner and his conversation were not of a nature to imply submission to the warrant, but merely a desire to gain time.[2]

Falkiner, Q. C., for the prisoner, submitted that there was no evidence of an arrest. The policemen had made no arrest in the first instance. The prisoner had merely waited for the visit of the sub-inspector at their request. Even if the prisoner was under compulsion, it was not a legal arrest, as the police had not a warrant, nor did they communicate its existence to the prisoner. On the arrival of the warrant there was no arrest, actual or constructive. After Gardiner's arrival, the prisoner was never put under compulsion, nor made any submission.

HIS LORDSHIP ruled that the arrest was perfect. The arrest by the policemen was good, subject to the production of the warrant afterwards. On the arrival of Gardiner with the warrant the arrest was complete. * * *

Convicted.[3]

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[2] Part of this case is omitted.

[3] See, also, Williams v. Jones, cas. t. Hardw. 298 (1735); Shannon v. Jones, 76 Tex. 141, 13 S. W. 477 (1890).

SECTION 2.—WHO MAY ARREST

It has been provided by the king and by his counsel that all, as well knights as others, who are of fifteen and more, ought to swear, that * * * if they shall hear hue and cry * * * they shall follow with their households and the men of their land, * * * and that they shall arrest, as far as may be in their power, those whom they regard as suspected without waiting for the mandate of the justice or of the viscount, and that what they shall have done thereupon they shall certify to the justices or the viscount.[4]

Bracton, fol. 116.

COMMONWEALTH v. CAREY.

(Supreme Judicial Court of Massachusetts, 1853. 12 Cush. 246.)

This was an indictment for murder, tried at Cambridge, June 2, 1851, before the Chief Justice, and Fletcher and Bigelow, JJ., charging the prisoner with the murder of George Heywood, at Lincoln, in the county of Middlesex, the 27th day of December, 1850. * * *

Shaw, C. J.[5] * * * Upon the question of the legality of the arrest, the opinion of the court was that any person, whether a police officer or a private person, may lawfully arrest any one guilty of a felony, with a view to bring him before a magistrate, that proceedings may be further taken to bring him to punishment.[6]

There was this difference, however, that a private person, who arrests another on a charge of felony, does it at the peril of being able to prove a felony actually committed by the person arrested.[7]

But if a constable or other peace officer arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful.

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[4] "The ordinary man seems to have been expected to be very active in the pursuit of malefactors, and yet 'to act at his peril.' This may be one of the reasons why, as any eyre roll will show, arrests were rarely made, except when there was hot pursuit after a 'hand-having' thief." 2 Pol. & Mait. Hist. Eng. Law, 581.

[5] Part of this case is omitted.

[6] Accord: On fresh pursuit: Commonwealth v. Grether, 204 Pa. 203, 53 Atl. 753 (1902); Rex v. Howarth, 1 Moody, 207 (1828).

[7] Accord: Siegel, Cooper & Co. v. Connor, 70 Ill. App. 116 (1897). The more general rule is stated by Savage, C. J., in Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702 (1829), as follows: "If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested." Accord: Allen v. Wright, 8 C. & P. 522 (1838); Reuck v. McGregor, 32 N. J. Law, 70 (1866); Teagarden v. Graham, 31 Ind. 422 (1869); Brooks v. Commonwealth, 61 Pa. 352, 100 Am. Dec. 645 (1869); Carr v. State, 43 Ark. 99 (1884).

Nor is it necessary, when a third person makes a complaint to a peace officer against a person, and gives him in charge to the officer, that the accusation should in terms technically import a felony; but when the language in its popular sense would import such charge, it is sufficient, as where one says to a peace officer, I wish you to take such a person in charge for having in his possession counterfeit bills, the natural import is that he intends to charge the party accused with having in his possession counterfeit bills, knowing them to be counterfeit, and with an intent to pass the same, without which incidents such possession would be innocent, and import no criminal charge at all.

But the court were further of opinion that a constable or other peace officer could not arrest one without a warrant for a crime proved or suspected, if such crime were not an offense amounting in law to felony.[8]

This is the old established rule of the common law, adopted and acted upon in this commonwealth, by which courts of justice are bound to be governed, until altered by the Legislature; that anciently there was a broad and marked distinction between felony and misdemeanor, the former being attended at common law with forfeiture of all the offender's goods; that by the statutes of this commonwealth, and especially by the revised statutes, the line of distinction between felonies and misdemeanors was in a great measure obliterated, and in many instances the law regarded as misdemeanors offenses of a greater moral turpitude than many felonies, yet it had not changed the rule in question, though perhaps it might be more wise in the Legislature to make the rule in question applicable to offenses measured by a different standard of aggravation, as by being punishable in the state prison, or otherwise.

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[8] Accord: S. A. & A. Ry. Co. v. Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542 (1898); In re Way, 41 Mich. 299, 1 N. W. 1021 (1879); Commonwealth v. Wright, 158 Mass. 149, 33 N. E. 82, 19 L. R. A. 206, 35 Am. St. Rep. 475 (1893). Except in breaches of the peace when the officer is present at the time the breach of the peace is committed. Coupey v. Henley, 2 Esp. 540 (1796); Shanley v. Wells, 71 Ill. 78 (1873); Pow v. Beckner, 3 Ind. 475 (1852); Cook v. Nethercote, 6 C. & P. 741 (1835); Fox v. Gaunt, 3 Barn. & Adol. 798 (1832). Or unless the offense may be reasonably supposed to eventuate in a felony, as wounding in an affray. Coupey v. Henley, 2 Esp. 540 (1796); Shanley v. Wells, 71 Ill. 78 (1873).

Statutes now very generally allow arrests by officers without warrant for misdemeanors done in the presence of the officer, or on immediate pursuit of the offender. O'Brian v. State, 12 Ind. 369 (1859); Hanway v. Boultbee, 4 C. & P. 350 (1830).

"The authorities from the Year Books down to the most recent and approved text-writers flow in one uniform course, and all agree that a justice of the peace, in a criminal case, may authorize any person whom he pleases to be his officer. All, however, consider that it is better to direct his process to the constable of the place where it is to be executed; and this because no other constable (or, a fortiori, a private person) can be compelled to execute it." King, P., in Commonwealth v. Keeper, 1 Ashm. (Pa.) 183 (1828).

The court further held, under this rule, and as applicable to this case, that if Mr. Heywood suspected, or had reasonable cause to suspect, and acted on the suspicion, that the person had stolen money, or any other property, from the ticket office, inasmuch as such stealing would have been larceny, and of course felony, the arrest was lawful, and the homicide committed by the person in attempting to escape would be murder, and not manslaughter, and that this would be a question of fact for the jury. But, further, that the breaking open of the ticket office, though with an intent to steal, but without in fact stealing, was a misdemeanor, and not a felony, and the arrest of the prisoner for that offense, or on a suspicion and belief, by a peace officer, that he had committed that offense, would not be a lawful arrest. It was the breaking of an office in the daytime, and came under the provisions of Rev. St. c. 126, § 13.

The court remarked that St. 1804, c. 143, § 5, which had been cited, had denominated the breaking a shop in the daytime, under certain circumstances, a felonious offense; yet two circumstances rendered that statute inapplicable to the present case. One was that it was accompanied with the circumstance that such breaking be done when some one is in the house, and putting such person in fear, one of the aggravating circumstances belonging to the offenses of burglary and robbery; and the other was that the statute has been repealed, without the re-enactment of any similar provision describing it as felony, but leaving it, as at common law, in the class of misdemeanors. If the deceased, therefore, in the present case, although legally qualified as a peace officer, understood, suspected, and believed only that the prisoner had broken open the ticket office, though with an intent to steal, and, acting upon that knowledge, suspicion, or belief, arrested the person without a warrant, it was an unlawful arrest.

In regard to the letter sent by Blaisdell to the deceased, the court were of opinion that it did not charge a felony, so as to make the arrest lawful without a warrant. It did not state or imply that the prisoner had stolen anything from the Stony Brook depot. Breaking open the depot would, of itself, be an offense for which the perpetrator would be liable to a severe punishment, but in character it was a misdemeanor, and not a felony; and, therefore, charging the prisoner with having broken open that depot did not directly, or by implication, charge a felonious offense, for which he could lawfully be arrested without a warrant. It is distinguishable from the case before mentioned, of giving one in charge for having counterfeit notes in his possession, because that charge necessarily implies a guilty knowledge and a guilty purpose, which, if they make the act criminal at all, make it a felonious one. Such were held to be the rules of law under which the court determined that the case must go to the jury.

Upon the announcement of the foregoing rulings, the counsel for the prisoner stated that they were not aware of any testimony which would essentially modify or control the case as it was presented by the evidence submitted on behalf of the government; and they proposed to submit it to the jury under the instructions of the court.

The Chief Justice then charged the jury in conformity with the foregoing rulings, and they returned a verdict of guilty of manslaughter.

STATE v. TAYLOR et al.

(Supreme Court of Vermont, Windsor, 1898. 70 Vt. 1, 39 Atl. 447, 42 L. R. A. 673, 67 Am. St. Rep. 648.)

Indictment of G. O. Taylor and John O'Donald for an assault with intent to kill and murder. Verdict and judgment of guilty, and sentence imposed at the respondents' request. The respondents excepted. Exceptions sustained.

MUNSON, J.[9] The alleged assault was committed upon Paul Tinkham, constable of Rochester, and three persons acting under him, while they were effecting an arrest of the respondents and two others, without a warrant, on suspicion of felony. The officer acted upon information received from Brandon by telephone, to the effect that the post office at Ticonderoga, N. Y., had been burglarized the night before, and that four persons suspected of the crime had left Forestdale, going in the direction of Rochester. When met by the officer and his assistants, the suspected party were coming along the highway in a wagon, driven by a liveryman from Forestdale.

The jury have found, under the charge of the court, that when Tinkham met the respondents' party he said to them that he arrested them by the authority of the state of Vermont, and that, upon inquiry being made as to which was the officer, Tinkham was designated as such by one of his party. The remainder of the transaction must be taken to have been in accordance with the testimony most favorable to the respondents' claim. The purport of this was that one of the respondents' party then asked Tinkham if he had any papers, and that Tinkham thereupon pulled a revolver from his pocket, saying that was all the papers he needed, at once returning the revolver to his pocket; and that respondent Taylor then said, with an oath, "You can't take this party without papers;" and that upon this all four of the suspected persons commenced to get out of the wagon, some of them firing at the constable's party as they did so.

The jury were instructed, in substance, that, if Tinkham had reasonable cause to suspect that the respondents had committed a burglary, he could arrest them without a warrant; and that if he told them that he arrested them by the authority of the state of Vermont, and if they knew he was an officer, it was their duty to submit; and that, if

[9] Part of this case is omitted. The judgment was reversed on other grounds.

they shot the officer under these circumstances, they were guilty of an assault with intent to murder. The respondents insist that the officer had no right to arrest without a warrant for a felony committed in another state; and that, if he had that right, there was a failure to disclose his authority, which justified their resistance; and that, in any event, the manner of the arrest was such that the grade of the offense should have been left to the determination of the jury.

It has been held in most of the states that, when one charged with the commission of a felony in one state escapes to another, he may be there arrested and detained before a demand for his return has been made by the governor of the state from which he has fled. In most of the cases where this doctrine has been enunciated the arrest was made upon the warrant of a magistrate. But in State v. Anderson, 1 Hill (S. C.) 327, it was held that an arrest by a private person, without a warrant, could be justified by showing prima facie that a felony had been committed in another state, and that the party arrested was the perpetrator. It is clearly the tenor of the decisions that the machinery provided for the arrest of local offenders is available for the arrest of fugitives from another jurisdiction; and it must follow that, when the arrest without warrant is made by an officer, it will be sufficient for his justification if it appear that he had reasonable cause to believe that the person arrested had committed a felony in another state, although more than this may be required for his detention, when brought before a magistrate. So, in Ex parte Henry, 29 How. Prac. (N. Y.) 185, it was said that the officers were undoubtedly authorized to arrest the prisoner upon reasonable ground of suspicion, although there was no proof on the hearing that the suspicion was well founded. It is well settled that the person whose arrest is attempted must have notice of the authority and purpose of the person who undertakes to arrest him. The first case in which this matter is elaborately treated is that of Mackaley, reported in Crò. Jac. 279, and more fully in 9 Coke, 61.

* * *

It is frequently said in the text-books and in judicial discussions that an officer must show his warrant, or state the grounds of the arrest, if demanded. But an examination of the authorities will show conclusively that this is not a part of the arrest, but a duty which immediately follows it. Upon submitting to the officer, the arrested party is entitled to this information; but he cannot put off the arrest, and increase his chances of escape, by requiring an explanation in advance. * * * It is evident from the adjudged cases that in the rule above stated, as to what is essential in making an arrest, notice of the officer's authority means notice of his official character, and not of the exact circumstances which authorize the arrest; and that notice of his purpose relates to the purpose to arrest, and not to the purpose of the arrest. It is beyond question that, in making an arrest by virtue of a warrant, the officer cannot be required to show the warrant.

or state the substance of it, until the arrest is accomplished. In this case there was no warrant, and the officer could arrest without one only in certain classes of cases. But we think the officer was no more obliged to state the conditions which authorized him to arrest without a warrant than he would have been to produce his warrant, or state the substance of it, in case of an arrest on warrant. All that the respondents could require, in the first instance, was a statement sufficient to show that the person who demanded their arrest was an officer, acting in his official capacity. This was clearly covered by the designation of Tinkham as the officer, and by his statement that he arrested them by the authority of the state of Vermont.

It appears, then, that the words of arrest employed by the officer were such as entitled him to an immediate submission to his authority, without answering the question regarding papers. * * * Exceptions sustained, sentence vacated, and cause remanded.

SECTION 3.—RIGHTS AND DUTIES OF PERSON MAKING ARREST

MACKALLEY'S CASE.

(Court of King's Bench, 1611. 9 Coke, 65, b.)

By the king's command all the judges of England were ordered to meet together to resolve what the law was, upon the said record; and accordingly all the judges of England, and barons of the exchequer, met together the beginning of Hilary term now last past, and heard counsel learned upon this special verdict, as well of the prisoners, as of the king; that is to say, Serjeant Harris the younger, Anthony Diot and Randall Crewe of counsel with the prisoners, and Yelverton, Waters, and Coventry for the king. And the matter was very well argued by counsel learned on both sides at two several days in the same term; and divers exceptions were taken to the indictment and to the verdict also.

First, against the indictment five exceptions were moved. (1) Because it appears that the arrest was tortious, and by consequence the killing of the serjeant could not be murder, but manslaughter, and they argued that the arrest alledged in the indictment was tortious, because it was made in the night, that is to say, 18 Diem Nov. inter horas quintam et sextam post meridiem, which appears to the court to be in the night, and the night is a time of rest and repose, and not to arrest any by his body, for thereof would ensue (as in hoc casu accidit) bloodshed; for the officer and minister of justice cannot have such assistance, nor can the peace be so well kept in the night, that is to say, in tenebris, as in the day, in aperta luce: and the prisoner cannot know the officer or ministers of justice in the night; nor can the prisoner so soon find sureties for his appearance in the night and thereby avoid his imprisonment, as he may in the day: and they cited 11 H. VII, 5, a, that the lord shall not distrain for his rent or services in the night. But it was answered by the counsel with the king, and in the end resolved by all the judges and barons of the exchequer, that the arrest in the night is lawful, as well at the suit of a subject as at the king's suit; for the officer or minister of justice ought to arrest him when he can find him; for otherwise perhaps he will never arrest him. * * *

As the officer or minister of justice may, by force of a warrant directed to him, arrest any at the king's suit either for felony or other crime in the night, so may he do at a subject's suit; for the king has no more prerogative as to the time to make an arrest, than a subject; for the arrest is to no other intent than to bring the party to justice; and it appears by the opinion of the court in the King's Bench in Semaine's Case in the fifth part of my Reports, that the sheriffs may arrest in the night, as well at the suit of a subject, as at the king's suit. And in Heydon's Case in the fourth part of my Reports it is resolved, that if one kills a watchman in execution of his office, it is murder, and yet that is done in the night; and if an affray be made in the night, and the constable, or any other who comes to aid him to keep the peace, be killed, it is murder; for when the constable commands them in the king's name to keep the peace, although they cannot discern or know him to be a constable, yet at their peril they ought to obey him.[10]

It was also resolved, that although in truth between five and six of the clock in November is part of the night, yet the court is not bound ex officio to take conusance of it, no more than in the case of burglary, without these words, in nocte ejusdem diei, or noctanter.

2. It was objected, that Sunday is not dies jurisdicus, and therefore no arrest can be made thereon, but it is the sabbath, and therefore thereon everyone ought to abstain from secular affairs for the better worship and service of God in spirit and truth. As to that it was answered and resolved, that no judicial act ought to be done on that day, but ministerial acts may be lawfully executed on the Sunday; for otherwise peradventure they can never be executed; and God permits things of necessity to be done that day; and Christ says in the Gospel, "Bonum est benefacere in Sabbatho." * * *

4. It was objected, that the said arrest found by the verdict was not lawful, for the serjeant in this case ought to have, when he arrested him, shewed at whose suit, out of what court, for what cause he made the arrest, and in what court it is returnable, to the intent, that if it be for any execution, he might pay the money, and free his body; and if it be upon mean process, either to agree with the party to put

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[10] Part of this case is omitted.

in bail according to the law, and to know when he shall appear, as it is resolved in the Countess of Rutland's Case, in the sixth part of my Reports, f. 54. But in the case at bar the serjeant said nothing but "I arrest you in the king's name, at the suit of Mr. Radford," and so the arrest not lawful, and by consequence the offense is not murder. As to that it was answered and resolved, that it is true that it is held in the Countess of Rutland's Case, that the sheriff, etc., or serjeant ought upon the arrest to show at whose suit, etc., but that is to be intended when the party arrested submits himself to the arrest, and not when the party (as in this case Murray did) makes resistance and interrupts him, and before he could speak all his words, he was by them mortally wounded and murdered, in which case, the prisoners shall not take advantage of their own wrong. It was also resolved, that if one knows that the sheriff, etc., has process to arrest him, and the sheriff, etc., coming to arrest him, the defendant to prevent the sheriff's arresting him, kills him with a gun or any other engine or weapon, before any arrest made, it is murder; a fortiori in the case at bar, when he knew by the said words, that the serjeant came to arrest him. * * *

6. It was objected, that the serjeant at the time, nor before the arrest showed the prisoner his mace; for thereby he is known to be the minister of the law, and from thence he has his name, S. Serviens ad clavam; et non allocatur for two causes: (1) Because the jury have found, that he was serviens ad clavam dicti vicecomitis, et juratus, et cognitus, et minister cur; and a bailiff sworn and known need not (although the party demands it) show his warrant; nor any other special bailiff is not bound to show his warrant, without demand of it (8 Edw. IV, 14, a; 14 Hen. VII, 9, b; 21 Hen. VII, 23, a), and where the books speak of a known bailiff, it is not requisite that he be known to the party who is to be arrested, but if he be commonly known it is sufficient. (2) If notice was requisite, he gave sufficient notice when he said, "I arrest you in the king's name," etc., and the party at his peril ought to obey him; and if he has no lawful warrant, he may have his action of false imprisonment. So that in this case without question the serjeant need not show his mace; and if they should be obliged to show their mace, it would be a warning for the party to be arrested to fly. * * *

ANONYMOUS.

(Upper Bench, 1650. Style, 238.)

The court was moved that one was arrested upon a day of thanksgiving appointed by Parliament, and that he was forced to put in bond to the sheriff for his appearance, and therefore it was prayed that the party arrested might be discharged, and that the bond given to the sheriff might be delivered up.

ROLL, the Chief Justice, answered: Indict the bailies that made the arrest, or bring your action against them, if you please, for we will not discharge the party arrested.[11]

ANONYMOUS.

(Upper Bench, 1653. Style, 395.)

The court was moved to discharge one Cullins, that was arrested as he was attending the court to give testimony as a witness in a cause, and for an attachment against the parties that did arrest him.

GERMAN, Justice (absente, ROLL, Chief Justice). Take a supersedeas, and let the parties show cause why an attachment shall not be granted against them that arrested him.[12]

UNITED STATES v. RICE.

(Circuit Court, W. D. North Carolina, 1875. 1 Hughes, 560, Fed. Cas. No. 16,153.)

On the 15th of last September, Andrew Woody, of Spring Creek, Madison county, was killed by Noah H. Rice, a United States deputy marshal, who was endeavoring to serve a capias on him for violation of the internal revenue laws. From facts developed before the court it appears that Woody had expressed a determination to resist any process which might issue against him, and had threatened to kill the defendant, Rice, if he attempted to arrest him. When this officer came upon Woody, the latter was armed with a rifle. His demeanor was hostile, and when commanded to surrender he so acted as to impress the officer with the belief that his intention was to shoot him, and in self-defense he fired upon Woody with fatal effect. Rice came to Asheville and surrendered himself to the authorities, was examined by Commissioner Watts on application for bail, and committed to jail. His case was finally removed to the United States court. On Tuesday, May 11, 1875, he was placed upon trial for his life. The jury having requested full instructions from the bench, they were given as follows by

DICK, J.[13] As this is a case of considerable importance to the defendant, and also to the due administration of justice, I have deemed it proper to commit to writing my instructions to the jury upon the questions of law involved. * * *

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[11] By St. 29 Car. II, c. 7, the service of all processes, warrants, orders, etc., on Sunday, were made unlawful, except for treason, felony, or breach of the peace. Under this statute it was held that any offense which subjected the party to an indictment was constructively a breach of the peace. See Pearce v. Atwood, 13 Mass. 347 (1816).

[12] See Carle v. Delesdernier, 13 Me. 363, 29 Am. Dec. 508 (1836); State v. Polacheck, 101 Wis. 427, 77 N. W. 708 (1898).

[13] Part of the charge is omitted.

It is conceded that the alleged homicide was committed by the defendant, and he places his defense upon the ground that he was a regular constituted officer of the United States, and had in his hands at the time of the homicide the process of law which authorized and commanded him to arrest the deceased for a crime against the United States; that the deceased resisted the execution of such process with a deadly weapon in his hands, and had manifested a purpose to use such deadly weapon in resistance; and that the homicide was necessarily committed in the attempt to make an arrest.

This defense necessarily leads us to inquire what protection the common law affords to ministerial officers, and how far they are authorized to go in the performance of their public duties.

Social order and political government are dependent upon the observance of law by the citizen. The mandates of the law are executed by officers provided for such purposes, and such officers are invested by the law with the authority necessary to execute its mandates, and it affords them all the protection possible in the rightful performance of the duties imposed. This rule is absolutely necessary for the advancement of justice, and is founded in wisdom and equity and in the principles of social and political order. The law must be supreme within the sphere of its operation, or its influence would be nugatory, and there would be no certain rule to regulate human conduct in society and government, and all the rights and liberties of citizens would soon be lost in a chaos of anarchy.

Mr. Justice Foster says: "Ministers of justice while in the execution of their offices are under the peculiar protection of the law." Foster, 308. If an officer is killed while performing his duty, the law deems such killing murder of malice prepense.

This protection is not confined to the precise time when the officer is performing his official duty, but extends over him while going to, remaining at, and returning from the place of action. Any opposition, obstruction, or resistance intended to prevent an officer from doing his official duty is an indictable offense at common law, and the punishment is regulated by the nature of the offense.

An officer is authorized to summons as many persons as may be necessary to assist him in the performance of his legal duties, and such persons are bound to obey such summons, and they are under the same protection afforded to officers, as they are for the time officers of the law. The law imposes upon private persons the duty of suppressing affrays, preventing felonies from being committed in their presence, and arresting such offenders and bringing them to justice; and such private persons, while performing their duties, are under the protection of the law. We may confidently lay down the broad general principle that, when any person is performing a public duty required of him by law, he is under the protection of the law. An officer of the law who has legal process in his hands is bound to execute it according to the mandate of the writ. If he is resisted in the performance of this duty, he must overcome such resistance by the use of such force as may be necessary for him to execute his duty. If necessary, the law authorizes him to resort to extreme measures, and if the resisting party is killed in the struggle the homicide is justifiable. Garrett's Case, 60 N. C. 144, 84 Am. Dec. 359.[14]

If unnecessary and excessive force is used, after resistance has entirely ceased and the defendant in the writ has manifested his willingness to submit to the mandates of the law and be arrested, then, if the said defendant is killed, the officer will be guilty of manslaughter; and if the blood had time to cool, the killing would be murder. 2 Wharton, Crim. Law, 1030, 1031, and authorities referred to in note.[15] If, however, the defendant in the writ only ceases his resistance upon the officer desisting from his attempt to arrest, and still keeps himself in a condition to renew the resistance with a deadly weapon, if the officer should renew the effort to arrest, and the officer cannot make the arrest without great personal danger, he would be justified in killing the defendant.

The submission of the defendant in such a case is not complete, and as long as he refuses to be arrested he is in a state of resistance; and if he is armed with a deadly weapon, and has manifested an intent to use it, and still keeps the weapon in his possession convenient for an emergency, and the officer has reasonable grounds for believing that the weapon will be used if an arrest is attempted, the officer is not required to risk his life in a rencounter, or desist from an effort to perform his duty. When a person puts himself in an armed and deadly resistance to the process of the law, he becomes virtually an outlaw, and officers are not required to show him the courtesy of a chivalrous antagonist and give him an open field and fair fight. It is only when a criminal submits to the law that it throws round him the mantle of protection and administers justice with mercy. It is the duty of every offender charged with crime in due process of law to quietly yield himself up to public justice. State v. Bryant, 65 N. C. 327; State v. Garrett, 60 N. C. 144, 84 Am. Dec. 359.

A known officer, in attempting to make an arrest by virtue of a warrant, is not bound to exhibit his warrant and read it to a defendant before he secures him, if he resists; if no resistance is offered, the officer ought always, upon demand made, show his warrant to the party arrested or notify him of the substance of the warrant, so that he may have no excuse for placing himself in opposition to the process of the law. This is only a rule of precaution. A defendant is bound to submit to a known officer; to yield himself immediately and peaceably into the custody of the officer before the law gives him the right of having the warrant read and explained, when in resistance the law shows him no favor. A defendant, knowing the arresting party to be an officer, is bound to submit to the arrest, reserving the right of action against the officer in case the latter be in the wrong. When a person acts in a public capacity as an officer, it will be presumed that he was rightfully appointed. 1 Wharton Cr. Law, §§ 1289, 2925; Cooley's Case, 6 Gray (Mass.) 350.

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[14] Accord: U. S. v. Jailer, 2 Abb. (U. S.) 265, 15 Fed. Cas. No. 15,463 (1867); Smith v. State, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20 (1894); State of North Carolina v. Gosnell (C. C.) 74 Fed. 734 (1896); Lynn v. People, 170 Ill. 527, 48 N. E. 964 (1897). Contra, where arrest is for a misdemeanor: Stephens v. Commonwealth (Ky.) 47 S. W. 229 (1898).

[15] Accord: Gosse's Case, Vent. 216 (1673); State v. Rose, 142 Mo. 418, 44 S. W. 329 (1898).

One who is not a known officer ought to show his warrant and read it, if required; but it would seem that this duty is not so imperative as that a neglect of it would make him a trespasser ab initio, when there is proof that the party subject to be arrested had notice of the warrant, and was fully aware of its contents, and had made up his mind to resist its execution at all hazards. Garrett's Case, supra.

The law, in its humanity and justice, will not allow unnecessary force to be used in the execution of its process. If a defendant, without any deadly weapon or manifestation of excessive violence, makes resistance, an officer is not justified in willfully shooting him down; but if a defendant has a deadly weapon, and has manifested a purpose to use it if an arrest is attempted, the officer is not bound to wait for him to have an opportunity of carrying his purpose into effect. If the warrant is for a misdemeanor, and a defendant attempts to avoid an arrest by flight, the officer has no right to shoot him down to prevent escape, nor even after an arrest has been made and defendant escapes from custody. Foster's Case, 1 Lew. Cr. Cas. 187.[16]

The rule is different in cases of felony. Bryant's Case, supra.[17]

If an officer has process in his hands issuing from a court of competent jurisdiction over the subject-matter, authorizing and commanding him to arrest a defendant, he is entitled to the protection which the laws afford officers acting under process, although the process in his hands is informal and irregular. If the process is illegal and void on its face, or is against the wrong person, or its execution is attempted out of the district in which it can alone be executed, then the officer would not be under the protection of the law;[18] but it would seem

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[16] Accord: Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626 (1879); Handley v. State, 96 Ala. 48, 11 South. 322, 38 Am. St. Rep. 81 (1892); State v. Smith, 127 Iowa, 534, 103 N. W. 944, 70 L. R. A. 246, 109 Am. St. Rep. 402 (1905).

[17] Accord: Carr v. State, 43 Ark. 99 (1884).

[18] "A warrant issued before indictment must specify the offense charged, the authority under which it issues, the person who is to execute it, and the person to be arrested." Nisbit, J., in Brady v. Davis, 9 Ga. 73 (1850).

"By the common law, a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him; * * * and by the great weight of authority in this country a warrant that does not do so will not justify the officer making the arrest." Gray, J., in West v. Cabell, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. Ed. 643 (1894). But see that, if he kills a resisting party under such circumstances, he would only be guilty of manslaughter, unless he had actual knowledge of his want of authority, or acted from express malice.

I have stated to you many points of law which do not directly arise in the case before us; but it is important that they should be known and well understood in the country, where, in recent years, so much violence has been committed—violence in the name of law and violence in the defiance of law.

The principles of law involved in this case having been explained to you by the court, it is now your duty to ascertain the facts from the testimony and apply them to the law as laid down by the court. * * *

The jury, after a retirement of two hours, found a verdict of "not guilty." [19]

LEIGH v. COLE.

(Staffordshire Spring Assizes, 1853. 6 Cox, Cr. Cas. 329.)

The declaration alleged that the defendant, on the 31st of August, 1852, assaulted and beat the plaintiff, and did thereby break his jawbone, and, further, that the defendant unlawfully imprisoned the plaintiff, and forced him to go handcuffed through the streets from Hanley to Shelton, and did unlawfully search the plaintiff's clothes. * * * [20]

Williams, J., in summing up, said: * * * First, with respect to handcuffing, the law undoubtedly is that police officers are not only justified, but they are bound to take all reasonably requisite measures for preventing the escape of those persons they have in custody for the purpose of taking them before the magistrates; but what those reasonable measures are must depend entirely upon circumstances, upon the temper and conduct of the person in custody, on the nature of the charge, and a variety of other circumstances which must present themselves to the mind of any one. As to supposing that there is any general rule that every one conveyed from the police station to the magistrate's court is to be handcuffed seems to me to be an unjusti-

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Bailey v. Wiggins, 5 Har. (Del.) 462, 60 Am. Dec. 650 (1854); Allen v. Leonard, 28 Iowa, 529 (1870); Tidball v. Williams, 2 Ariz. 50, 8 Pac. 351 (1885).

[19] In effecting an arrest without a warrant, for a felony, the person arresting, whether he be an officer or a private person, may use sufficient force to effect the arrest of the felon, even to the extent of taking life if necessary. 1 Hale, P. C. 587, 588; Conraddy v. People, 5 Parker, Cr. R. 234 (1862). Cf. Regina v. Murphy, 1 Cr. & Dix. 20 (1839).

In arresting upon suspicion of a felony, an officer (and, a fortiori, a private person) can only justify killing the person he seeks to arrest by proof that the felony was actually committed by some one. Conraddy v. People, 5 Parker, Cr. R. 234 (1862). Cf. Reg. v. Dadson, 3 Car. & K. 148 (1850). ?

Since one arresting for a misdemeanor, with a warrant, cannot kill merely to effect the arrest, in arresting for such an offense without a warrant his rights are no greater.

[20] Part of this case is omitted.

fiable view of the law, and one on which the police officers are mistaken. In many instances a man may be conveyed before the magistrates without handcuffing him, and taking him thus publicly through the streets. On the other hand, it is necessary to take proper precautions in conveying a person in custody to be dealt with by the magistrates; and you must say whether, looking at all the circumstances of the case, the defendant used unreasonable precautions in this case, or used unnecessary measures to secure the safe custody of the plaintiff.

With respect to searching a prisoner, there is no doubt that a man when in custody may so conduct himself, by reason of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace; but at the same time it is quite wrong to suppose that any general rule can be applied to such a case. Even when a man is confined for being drunk and disorderly, it is not correct to say that he must submit to the degradation of being searched, as the searching of such a person must depend upon all the circumstances of the case. You will consider, then, whether the case of the plaintiff is one in which a search should have been made, and if you are of opinion that it is not such a case, then you will say what amount of damages he is entitled to; but on the other hand, if you think the search was properly made, and the defendant was justified in making it, then the plaintiff is not entitled to any damages in respect of that part of the case; and you will adopt the same course with respect to the handcuffing. * * *

The jury (after retiring) found a verdict for the defendant. At the same time they (through the foreman) expressed their opinion that it was improper to confine a man charged with drunkenness in the same cell with a person charged with felony, and that it was also improper to handcuff him to another prisoner when taking him before a magistrate.

Williams, J., thereupon reminded the jury that he had told them, if the defendant had been guilty of any excess of duty, they might give the plaintiff compensation for any injury he had received thereby.

The foreman of the jury said they had considered the matter, and they only expressed their opinion with reference to the future.

Verdict for the defendant accordingly.[21]

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[21] Cf. Commonwealth v. Weber, 167 Pa. 153, 31 Atl. 481 (1895).

"It is common learning that an officer may, without a precept, arrest any person he finds committing an offense. It is also well known that he must within a reasonable time, bring his prisoner before the proper court, or obtain a legal precept for detaining him. A failure to do so may make the officer a trespasser. Rev. St. c. 133, § 4. An officer, making an arrest upon a criminal charge, may also take from his prisoner the instruments of the crime and such other articles as may be of use as evidence upon the trial. These may not be confiscated or destroyed by the officer, however, without some

SEMAYNE'S CASE.

(Court of King's Bench, 1604. 5 Coke, 91 a.)

In an action on the case by Peter Semayne, plaintiff, and Richard Gresham, defendant, * * * these points were resolved. * * * (3) In all cases when the king is party, the sheriff, if the doors be not open, may break the party's house, either to arrest him or to do other execution of the king's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open the doors; and that appears well by the Statute of Westm. I, c. 17 (which is but an affirmance of the common law), as hereafter appears, for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man), by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it, and that appears by the book in 18 Edw. II, Execut. 252, where it is said that the king's officer who comes to do execution, etc., may open the doors which are shut, and break them if he cannot have the keys, which proves, that he ought first to demand them. * * * [22]

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order or judgment of a court. We do not find any authority or reason for the officer rendering any judgment in the matter. He holds the property, as he does the prisoner, to await and subject to the order of the court." Emery, J., in Thatcher v. Weeks, 79 Me. 548, 11 Atl. 599 (1887).

[22] Part of this case is omitted.

Accord: State v. Oliver, 2 Houst. (Del.) 585 (1855); State v. Mooring, 115 N. C. 709, 20 S. E. 182 (1894). Even though the occupant know the purpose for which the officer comes. Hall v. Hall, 6 Gill & J. (Md.) 386 (1834). But see Commonwealth v. Reynolds, 120 Mass. 190, 21 Am. Rep. 510 (1876). The officer does not become a trespasser ab initio if the accused is in fact not in the house, even though he is notified of this fact by persons in the house. State v. Mooring, supra.

The officer need not inform the occupant who the person sought is, unless such information is demanded. Commonwealth v. Reynolds, 120 Mass. 190, 21 Am. Rep. 510 (1876).

It seems that the right to break doors when the arrest is on a warrant extends to arrests for misdemeanors as well as felonies. State v. Shaw, 1 Root (Conn.) 134 (1789); State v. Mooring, supra. Contra: Commonwealth v. Supt. Co. Prison, 5 Pa. Dist. R. 635 (1896).

Arrest Without Warrant.—Whether doors may be broken in the arrest of a felon, without a warrant, see 2 Hawk. P. C. c. 14; 1 Hale, P. C. 583; 4 Black. Comm. 292.

Since a court has no jurisdiction over foreign sovereigns, their ambassadors, diplomatic agents, and persons belonging to their suites, such persons are exempt from arrest. See Dupont v. Pichon, 4 Dall. 321, 1 L. Ed. 851 (1805); Musurus Bey v. Gadban, [1894] 1 Q. B. 533; Rev. St. §§ 4062–4065 (U. S. Comp. St. 1901, pp. 2760–2761).

CHAPTER V

EXTRADITION

STATE OF KENTUCKY v. DENNISON.

(Supreme Court of the United States, 1860. 24 How. 66, 16 L. Ed. 717.)

A motion was made in behalf of the state of Kentucky, by the direction and in the name of the Governor of the state, for a rule on the Governor of Ohio to show cause why a mandamus should not be issued by this court, commanding him to cause Willis Lago, a fugitive from justice, to be delivered up, to be removed to the state of Kentucky, having jurisdiction of the crime with which he is charged.[1] * * *

Mr. Chief Justice TANEY delivered the opinion of the court. * * * This brings us to the examination of the clause of the Constitution which has given rise to this controversy. It is in the following words: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

Looking to the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction. The words, "treason, felony, or other crime," in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the state. The word "crime" of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called "misdemeanors," as well as treason and felony. 4 Bl. Com. 5, 6, and note 3, Wendall's edition.

But as the word "crime" would have included treason and felony, without specially mentioning those offenses, it seems to be supposed that the natural and legal import of the word, by associating it with those offenses, must be restricted and confined to offenses already known to the common law and to the usage of nations, and regarded as offenses in every civilized community, and that they do not extend to acts made offenses by local statutes growing out of local circumstances, nor to offenses against ordinary police regulations. This is one of the grounds upon which the Governor of Ohio refused to deliver Lago, under the advice of the Attorney General of that state.

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[1] Part of this case is omitted.

But this inference is founded upon an obvious mistake as to the purpose for which the words "treason and felony" were introduced. They were introduced for the purpose of guarding against any restriction of the word "crime," and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice. According to these usages, even where they admitted the obligation to deliver the fugitive, persons who fled on account of political offenses were almost always excepted, and the nation upon which the demand is made also uniformly claims and exercises a discretion in weighing the evidence of the crime, and the character of the offense. The policy of different nations, in this respect, with the opinions of eminent writers upon public law, are collected in Wheaton on the Law of Nations, 171, Fœlix, 312, and Martin (Verge's Ed.) 182. And the English government, from which we have borrowed our general system of law and jurisprudence, has always refused to deliver up political offenders who had sought an asylum within its dominions. And as the states of this Union, although united as one nation for certain specified purposes, are yet, so far as concerns their internal government, separate sovereignties, independent of each other, it was obviously deemed necessary to show, by the terms used, that this compact was not to be regarded or construed as an ordinary treaty for extradition between nations altogether independent of each other, but was intended to embrace political offenses against the sovereignty of the state, as well as all other crimes. And, as treason was also a "felony" (4 Bl. Com. 94), it was necessary to insert those words, to show in language that could not be mistaken, that political offenders were included in it. * * *

The argument on behalf of the Governor of Ohio, which insists upon excluding from this clause new offenses created by a statute of the state, and growing out of its local institutions, and which are not admitted to be offenses in the state where the fugitive is found, nor so regarded by the general usage of civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn with anything like certainty? Who is to mark it? The Governor of the demanding state would probably draw one line, and the Governor of the other state another. And, if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion. It would have been far better to omit it altogether, and to have left it to the comity of the states, and their own sense of their respective interests, than to have inserted it as conferring a right, and yet defining that right so loosely as to make it a never-failing subject of dispute and ill will. * * *

Looking, therefore, to the words of the Constitution—to the obvious policy and necessity of this provision to preserve harmony between states, and order and law within their respective borders, and to its early adoption by the colonies, and then by the confederated states, whose mutual interest it was to give each other aid and support whenever it was needed—the conclusion is irresistible that this compact ingrafted in the Constitution included, and was intended to include, every offense made punishable by the law of the state in which it was committed, and that it gives the right to the executive authority of the state to demand the fugitive from the executive authority of the state in which he is found; that the right given to "demand" implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the state to which the fugitive has fled. * * *

The question which remains to be examined is a grave and important one. When the demand was made, the proofs required by the act of 1793 to support it were exhibited to the Governor of Ohio, duly certified and authenticated; and the objection made to the validity of the indictment is altogether untenable. Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other state. And whether the charge against Lago is legally and sufficiently laid in this indictment according to the laws of Kentucky is a judicial question to be decided by the courts of the state, and not by the executive authority of the state of Ohio.

The demand being thus made, the act of Congress declares that "it shall be the duty of the executive authority of the state" to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding state. The words, "it shall be the duty," in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several states bear to each other, the court is of opinion the words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. Indeed, such a power would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the federal government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it; for, if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the state. * * *

And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the executive of every state, for every state had an equal interest in the execution of a compact absolutely essential to their peace and well-being in their internal concerns, as well as members of the Union. Hence the use of the words ordinarily employed when an undoubted obligation is required to be performed, "it shall be his duty."

But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him.

And upon this ground the motion for the mandamus must be overruled.[2]

In re MOHR.

(Supreme Court of Alabama, 1883. 73 Ala. 503. 49 Am. Rep. 63.)

Somerville, J.[3] The purpose of the present application is to vacate the action of the probate judge, discharging one Alexander Mohr from alleged illegal custody, on his petition for the writ of habeas corpus. The return to the writ showed that the petitioner was held in the custody of the relator, Frederick Gentner, as agent of the state of Pennsylvania, under a warrant of arrest issued by authority of the Governor of Alabama, pursuant to a requisition from the Governor of the former state, demanding his extradition as a fugitive from justice. The crime charged is that of obtaining goods by false pretenses. The probate judge permitted evidence to be introduced, showing that the prisoner was not in the state of Pennsylvania at the time of the commission of the alleged offense, and had never been there since; that the goods were obtained by purchase from an agent of the prosecutor in the state of New York, to whom the false representations, if any, were made; and that the petitioner had never fled from the state of Pennsylvania, and was not a fugitive from justice. It is claimed that the state courts have no jurisdiction of the case, and, if so, that the probate judge had no jurisdiction to go behind the warrant of the executive, to investigate the question as to whether or not the prisoner was in fact a fugitive from justice, and that the proceedings before him were coram non judice and void. * * *

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[2] "The power to surrender fugitives, who, having committed offenses in a foreign country, have fled to this for shelter, belongs, under the Constitution of the United States, exclusively to the federal government." Taney, C. J., in Holmes v. Jennison, 39 U. S. 579, 10 L. Ed. 579 (1840).

[3] Part of this case is omitted.

Is it permissible to show that the case is not one coming within the provisions of the Constitution and act of Congress, because the party charged is not a fugitive from justice, having committed the alleged offense, if at all, only constructively while outside of the territorial jurisdiction of the demanding state? Or are the papers in the case, in connection with the warrant of arrest issued by the Governor of this state, to be regarded as importing absolute verity in this particular, so as to be incapable of contradiction?

The statute provides that, if the return to the writ of habeas corpus shows that the petitioner is "in custody for any public offense, committed in any other state or territory, for which, by the Constitution and laws of the United States, he should be delivered up to the authority of such state or territory," he should be remanded. Code 1876, § 4957. This is, perhaps, merely declaratory of what the law would require in the absence of the statute. The power claimed by the prisoner is the right to show that his case is one outside of the class intended to be covered by the Constitution and laws of the United States.

The authorities are not in harmony as to what questions can be reviewed by habeas corpus in cases of extradition. It seems very certain that there is no power to go behind the indictment or affidavit, with the view of investigating the question of the prisoner's guilt or innocence. In re Clark, 9 Wend. (N. Y.) 212. He cannot be put upon trial for the crime with which he is charged, nor can any inquiry be made into either the merits of his defense, or mere formal defects in the charge. These inquiries are reserved for the courts of the demanding state, having jurisdiction of the offense. People v. Brady, 56 N. Y. 182; Robinson v. Flanders, 29 Ind. 10. Congress has seen fit to adopt special legislation regulating this phase of the evidence in the case. The act of 1793 makes conclusive the production of a copy of the indictment found, or an affidavit made before a magistrate of the demanding state, "charging the person demanded with having committed treason, felony, or other crime," certified as authentic by the Governor of such state. Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597). These papers, if in due form, are made conclusive evidence of the guilt of the accused, when assailed on habeas corpus. It may be considered, therefore, as the settled doctrine of the courts, that a prima facie case is made, when the return to the writ of habeas corpus shows: (1) A demand or requisition for the prisoner, made by the executive of another state, from which he is alleged to have fled; (2) a copy of the indictment found, or affidavit made before a magistrate, charging the alleged fugitive with the commission of the crime, certified as authentic by the executive of the state making the demand; (3) the warrant of the Governor authorizing the arrest. Where these facts are made to appear by papers regular on their face, there is a weight of authority holding that the prisoner is prima facie under legal restraint. Spear's Law of Extrad. 208–303; Matter of Clark, 9 Wend. (N. Y.) 212; State v. Schlemn, 4 Har. (Del.) 577; In re Hooper, 52 Wis. 699, 58 N. W. 741; People v. Brady, 56 N. Y. 182; Bump's Notes of Const. Dec. 295–297; Johnston v. Riley, 13 Ga. 97.

Many of the cases hold that the warrant of the Governor, reciting these jurisdictional facts, is itself prima facie sufficient to show that all the necessary prerequisites have been complied with prior to its issue by him, although as to this proposition there is a conflict of opinion. Davis' Case, 122 Mass. 324; Kingsbury's Case, 106 Mass. 223; Robinson v. Flanders, 29 Ind. 10; Hartman v. Aveline, 63 Ind. 344, 30 Am. Rep. 217. Which of these is the correct view we need not decide, as all the proper papers in due form are set out in the return made to the writ by the respondent, Gentner, who is the relator in this proceeding.

It is obvious that the extradition clause of the federal Constitution has reference only to a specified class, and not to all criminals. Its language is: A person charged with any crime "who shall flee from justice and be found in another state." Article 4, § 2. The act of Congress is more emphatic, if possible, in describing such person as an actual fugitive, characterizing him as one who "has fled," and the state in which he is found as the state to which he "has fled." Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597). It may be considered clear, therefore, without any conflict of authority, that the Constitution and laws of Congress do not provide for the extradition of any persons except those who may have fled from or left the demanding state as fugitives from the justice of that state. Whart. Cr. Pl. & Pr. (8th Ed.) 31, and cases cited; Spear's Law of Extrad. 273, 310–316. "The offense," says Mr. Cooley, "must have been actually committed within the state making the demand, and the accused must have fled therefrom." Cooley's Const. Lim. (5th Ed.) 16, note 1.

There is a difference of opinion as to what must be the exact nature of this flight on the part of the criminal, but the better view, perhaps, is that any person is a fugitive, within the purview of the Constitution, "who goes into a state, commits a crime, and then returns home." Kingsbury's Case, 106 Mass. 223; Hurd on Hab. Corp. 606. In the Case of Voorhees, 32 N. J. Law, 141, he was characterized as one "who commits a crime in a state, and withdraws himself from such jurisdiction." This point, however, we need not decide, as it is shown that the prisoner, Mohr, has never been into the jurisdiction of the demanding state since the commission of the alleged crime. He cannot, therefore, be said to be a fugitive from the justice of that state.

It is clear to our mind that crimes, which are not actually, but are only constructively, committed within the jurisdiction of the demanding state, do not fall within the class of cases intended to be embraced by the Constitution or act of Congress. Such at least is the rule, unless the criminal afterwards goes into such state and departs from it, thus subjecting himself to the sovereignty of its jurisdiction. The reason is, not that the jurisdiction to try the crime is lacking, but that no one can in any sense be alleged to have "fled" from a state, into the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime. And only this class of persons are embraced within either the letter or spirit of the Constitution, the purpose of which was to make the extradition of fugitive criminals a matter of duty, instead of mere comity between the states. The language of the Constitution and the law of Congress are entirely free from ambiguity on this point, being too obvious to admit of judicial construction; and the authorities are uniform in adoption of this view as to its manifest meaning. Whart. Cr. Pl. & Pr. (8th Ed.) § 31; Spear's Law of Extrad. 309–316; Voorhees' Case, 32 N. J. Law, 147; Kingsbury's Case, 106 Mass. 223; Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968; Wilcox v. Nolze, 34 Ohio St. 520.

We are of opinion that it was never intended by Congress, in their enactment of the law of 1793, that the finding of the Governor of a state that one is a fugitive from justice should be conclusive evidence of that fact, incapable of contradiction by facts showing the contrary. It is an important feature of the law, throwing some light upon its proper construction, that while it expressly prescribes the mode by which evidence of the crime charged shall be authenticated, it nowhere prescribes how the fact that he is a fugitive from justice shall be established. There seems to us to have been a good and sufficient reason for this distinction. Nothing was more proper than the policy of precluding the fugitive from disputing the certified records from the courts of a sister state, in view of the constitutional requirement that "full faith and credit" shall be given in each state to "the records and judicial proceedings of every other state." Const. U. S. art. 4, § 1.

But no such reason applies to the implication of the defendant's being a fugitive, because he is found in another state than the one in whose courts the charge is pending. It may be asserted that it was within the power of the Governor to investigate this fact before he issued the warrant, so as to satisfy himself of its truth. Perhaps this is the correct view; but this duty must, in its very nature, be discretionary. In practice, the fact of the criminal's flight is usually shown by affidavit; but this cannot be regarded as conclusive upon any principle known to us, in the absence of statutory regulation so declaring the law. The better view seems to us to be that one of the purposes of pretermitting express congressional legislation on this point was to refer the matter to executive determination, subject to review by habeas corpus in the courts in all proper cases. The papers being regular, the Governor has a right to suppose that a prima facie case exists for a warrant, and the safer practice would seem to be that the accused should be remitted to the courts to establish matters of defense aliunde the record. Especially is this true in doubtful cases.

As we have said, the grounds of imprisonment in this class of cases are constantly reviewed by habeas corpus, in the state courts. Whart. Cr. Pl. & Pr. § 35. It is just as material to show that the prisoner does not come within the law, on the ground that he has never fled from the demanding state, as on the ground that he is not the identical person intended to be indicted, or that there is no authenticated copy of the indictment, or other charge against him. All of these facts must concur, before the law authorizes the requisition to be made, or the warrant of arrest to issue. They are jurisdictional facts, in the absence of which the prisoner is excluded from the operation and influence of the law, and no extradition can be constitutionally authorized by congressional legislation. Whart. Cr. Pl. & Pr. (8th Ed.) §§ 31, 34, 35.

This view is supported by the best-considered cases, and parol evidence has been often admitted by the courts, in proceedings by habeas corpus, for the purpose of showing that the warrant of the Governor was improvidently issued under the mistaken belief that the prisoner was a fugitive. * * *

We are of opinion that the probate judge did not err in discharging the petitioner, and that it was competent for him to hear oral evidence, in order to establish the fact that the petitioner was not a fugitive from justice.

Any other conclusion than this would establish a doctrine very dangerous to the liberty of the citizen. It would greatly impair the efficacy of the proceeding of habeas corpus, which has often been characterized as the great writ of liberty, and may be regarded, not less than the right of trial by jury, as one of the chief corner stones in the structure of our judiciary system. It might justly be considered as alarming to announce that a writ, which has so frequently been used for centuries past to prevent the encroachment of kings upon popular liberty, is inadequate for the just purpose for which it has been invoked in this case.

The application made by the relator must be denied.[4]

Brickell, C. J., dissents.

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[4] See, also, Illinois v. Pease, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. Ed. 121 (1907).

"Whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of evidence, and is final for the purpose of the preliminary examination unless palpably erroneous in law." Fuller, C. J., in Ornelas v. Ruiz, 161 U. S. 509, 16 Sup. Ct. 691, 40 L. Ed. 784 (1896).

"It is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another." Matthews, J., in Roberts v. Reilly, 116 U. S. 97, 6 Sup. Ct. 300, 29 L. Ed. 544 (1885).

In re HOPE.

(New York Executive Chamber, 1889. 10 N. Y. Supp. 28.)

James Hope was brought from California to New York under a requisition from the Governor of New York, was convicted of the crime charged, and sentenced to a term of imprisonment. After his term had expired, and before an opportunity had been given him to return to California, he was arrested on a requisition from the Governor of Delaware to the Governor of New York, and he now applies to the Governor of New York to vacate the warrant of arrest.

Hill, Governor. The Governor of Delaware has issued a requisition upon me for the return to that state of the prisoner, James Hope. The papers accompanying the requisition consist of a copy of an indictment against Hope for burglary, and a record of conviction thereunder in Delaware, showing his sentence for ten years, and proof by affidavit that he escaped from jail with over nine years of such sentence unserved. His return to that state is demanded for the purpose of compelling him to serve out the remainder of his unexpired sentence. The requisition was honored by me pro forma, and the prisoner arrested, and now, after a full hearing has been had, the question arises whether the warrant should not be revoked. Mr. Charles W. Brooke, the prisoner's counsel, insists that the requisition should be revoked, upon the ground that there is no authority under the Constitution and the laws for the extradition of an escaped convicted prisoner. He argues that a person can only be returned to another state to answer a charge made against him upon which no conviction has yet been had.

The broad ground is taken that there is no legal remedy whatever provided to secure his return where a convicted felon escapes from one state into another. If this be true, it is new doctrine, indeed, and discloses a lamentable defect in our criminal laws. The constitutional provision relating to interstate extradition (article 4, § 2, subd. 2) declares that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall * * * be delivered up, to be removed to the state having jurisdiction of the crime." It is seriously urged that a person cannot be deemed to be "charged" with a crime when he has already been convicted for such crime. It seems to be claimed that the "charge" no longer exists because it is deemed merged in the conviction. It is also urged that the law-writers have laid it down in the books that the declared object of an extradition is the removal of the person charged with the crime for the purpose of his being subsequently tried upon the charge presented against him, and that extradition cannot be invoked for any other purpose. This is ordinarily so, and correctly states the general rule. These expressions to be found in the books, however, have reference, not to exceptional instances, but to the usual class of cases where offenders have fled from one state to another prior to apprehension or conviction. Such flights are common, while escapes after conviction are rare.

It is clear that in enunciating a general proposition there was no intention of excluding or exempting convicted escaped persons from liability to extradition. No narrow or strained construction should be placed upon the word "charged," as used in the constitution and in the federal statute. It is broad enough to include all classes of persons duly accused of crime. A person can be said to be "charged" with crime as well after his conviction as before. The conviction simply establishes the charge conclusively. An unsatisfied judgment of conviction still constitutes a "charge" within the true intent and meaning of the constitution. An indictment or affidavit merely presents the charge, while a conviction proves it. To warrant extradition the statute requires an indictment or affidavit charging a crime, but if, in addition thereto, there is also presented a record of conviction, the case is not weakened but rather strengthened. The public purpose to be effected by extradition must be taken into consideration in determining the question. Its object is to prevent the successful escape of all persons accused of crime, whether convicted or unconvicted, and to secure their return to the state from whence they fled, for the purpose of punishment. It is invoked to aid the administration of criminal justice, and to more certainly insure the punishment of the guilty.

The construction contended for by the prisoner's counsel would defeat the ends of justice in many instances, and it is conceded that there is no express decision favoring it. It has been usual to grant extradition in similar cases. The Case of Carter, decided by me on July 10, 1885, but not reported, was just such a case, although this precise point was not then raised. In Dolan's Case, 101 Mass. 219, and in Hollon v. Hopkins, 21 Kan. 638, the prisoners were returned by extradition to other states to serve out unexpired sentences, and no such question seems to have been raised as to the legality of the proceedings. This first point raised by the prisoner's counsel seems altogether too technical, and I am constrained to overrule it.

The next question presented is not without merit. It was shown upon the hearing before me that Hope did not voluntarily come into this state, but was brought here in 1887 from the state of California, on a requisition from the Governor of this state, to answer a charge of crime made against him, and that since he has been incarcerated in the Auburn prison; and it appears that upon his term of imprisonment expiring, he has been arrested under or by virtue of the requisition in question from the Governor of Delaware. It is conceded that such arrest was made before a reasonable time and opportunity had been given him, after his release from Auburn, to return to California, where he claims he desired and intended to go. This state of facts presents an interesting question upon which there have been conflicting decisions for many years. Upon principle, I think, it is clear that where a prisoner is brought into this state from another state or country upon extradition proceedings, he cannot properly be tried upon any other charge than that mentioned in the requisition, and that upon his acquittal, or if convicted, then upon the expiration of his imprisonment, he is entitled to a reasonable time in which to return to the other state or country from which he was thus forcibly taken before he can be again arrested.

The recent decision of the Supreme Court of the United States (U. S. v. Rauscher, 119 U. S. 407–429, 7 Sup. Ct. 234, 30 L. Ed. 425) must be deemed to settle this question in accordance with the doctrine above stated. Although, in that case, the prisoner was brought from a foreign country, the decision is applicable to this case, because in principle there is no practical difference between the case of a fugitive brought from a neighboring state under the Constitution and laws of the United States and one brought from a foreign country under the provisions of its treaties. In the Rauscher Case, above cited, all the conflicting authorities in both the federal and state courts are reviewed and considered in the able opinion of the court by Mr. Justice Miller, and the principle here contended for is expressly approved. This being the decision of the highest court in the land upon a question which must be regarded as essentially federal in its character, it should be respected and followed, not only by all federal courts, but by all state courts as well. The cases which have held heretofore, either expressly or impliedly, a contrary doctrine—and there are many (Adriance v. Lagrave, 59 N. Y. 110, 17 Am. Rep. 317; U. S. v. Lawrence, 13 Blatchf. 295, Fed. Cas. No. 15,572; Hackney v. Welsh, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101; Williams v. Bacon, 10 Wend. 636)—should no longer be regarded as good authority upon this particular question. This is the view taken in the recent cases of State v. Hall, 40 Kan. 338, 19 Pac. 918, 10 Am. St. Rep. 200, and In re Reinitz (C. C.) 39 Fed. 204, 4 L. R. A. 236, 23 Abb. N. C. 69, in each of which the Rauscher Case is followed.

It is believed that the decision in the Rauscher Case will be cheerfully acquiesced in by the courts and officials of all the states, not solely because it is the interpretation of the law from our highest court, but also because it will be found upon reflection to be entirely correct in principle. It is in harmony with the views expressed by the best text-writers upon extradition. It is in accordance with common sense. It will render extradition proceedings entirely consistent, and prevent unseemly conflicts of jurisdiction. The true theory which now seems to be firmly established, is that a state should not be allowed to obtain jurisdiction of a fugitive from justice, and then to take advantage of that jurisdiction thus obtained, and use it for another and different purpose; that a fugitive surrendered on one charge is exempt from prosecution on any other; that he is within the state by compulsion of law upon a single accusation, and has a right to have that disposed of, and then to depart in peace; and that if, after his release, he remains in the state beyond a reasonable time, he then can be arrested, but not otherwise.

It follows from what has been here stated that the arrest in this case was premature, and that the warrant heretofore issued should be revoked.[5]

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[5] Before the fugitive can be lawfully delivered up, it must appear in the proceedings for extradition that he has been charged with the commission of the crime either by indictment or affidavit. Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597). A charge by information is not sufficient. Ex parte Hart, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801 (1894). Contra: In re Hooper, 52 Wis. 699, 58 N. W. 741 (1881).

CHAPTER VI

PROCEEDINGS BEFORE MAGISTRATE

WINDHAM v. CLERE.

(Court of Queen's Bench, 1588. Cro. Eliz. 130.)

Action upon the case. And declares, that the defendant was a justice of peace in the county of N. And whereas the plaintiff was a loyal subject, etc. the defendant maliciously intending to deprive him of his good name and fame, did direct his warrant, and shews it in certainty, etc. to divers constables to attach him; alleging he was accused of the stealing of the horse of A. B. by reason whereof he was arrested, till he put in bond to appear, etc. ubi revera he was never accused, nor did steal the horse, and the defendant did know him to be guiltless; by reason whereof he was greatly discredited. Upon non culp' pleaded, it was found for the plaintiff. And it was held by CLENCH and GAWDY, the action was maintainable. If a man be accused to a justice of peace for an offense, for which he causes him to be arrested by his warrant, although the accusation be false, yet he is excusable; but if the party be never accused, but the justice of his malice and own head cause him to be arrested, it is otherwise. And they commanded judgment to be given for the plaintiff. 14 Hen. VIII.

BLODGETT v. RACE.

(Supreme Court of New York, 1879. 18 Hun, 132.)

BOCKES, J.[1] A complaint in writing, charging a criminal offense, although on information and belief only as to the person suspected of having committed it, is sufficient to authorize an investigation before a magistrate by the examination of witnesses. The magistrate on such complaint may issue subpœnas for witnesses, and has jurisdiction of the subject-matter of the offence charged to have been committed, and may compel the attendance of witnesses by attachment in case of disobedience of the subpœna. People v. Hicks, 15 Barb. 153. But before a warrant can lawfully issue for the arrest of the offender the magistrate must have some evidence of his guilt. Facts and circumstances, stated on information and belief only, without giving any sufficient grounds on which to base the belief, are insufficient to confer jurisdiction as to the person. The magistrate must have evidence of probable cause, both as to the commission of the offense and the guilt of the offender, before he can have jurisdiction to cause the arrest. Comfort v. Fulton, 39 Barb. 56; Vredenburgh v. Hendricks, 17 Barb. 179; Wilson v. Robinson, 6 How. Prac. 110; Pratt v. Bogardus, 49 Barb. 89; People v. Hicks, 15 Barb. 153; Wells v. Sisson, 14 Hun, 267; Carl v. Ayers, 53 N. Y. 14. It is laid down in Waterman's Notes to Archbold's Criminal Practice and Pleadings (vol. 1, 20, marginal page 31) that a warrant cannot be issued against one, if his guilt appears only from hearsay and mere rumor, but that a case of probable guilt, on the part of the accused, must be made out. If facts and circumstances be stated, sufficient to call for judicial determination, the magistrate will be protected in his action, and this, although he might err in judgment. In such case he is to be fully protected and the error can only be made available on writ of error or appeal in the action, or proceeding in which the error occurred.

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[1] The statement of facts is omitted.

As to the case in hand, it seems that the warrant was issued on less proof even than information or belief as regards the plaintiff. It was issued on an allegation only of "suspicion and belief" as to the plaintiff's guilt. No fact or circumstance whatever was stated to support the suspicion, even much less to support a conclusion of probable cause against him. The warrant was without jurisdiction, hence afforded the defendant no protection against the charge of an illegal arrest. It is not necessary here to hold that the defendant had no ground for committing the plaintiff after the open public examination was had. It is quite possible, and I think it must be assumed, that there was sufficient evidence given before him to uphold his conclusion to commit. But we do not pass upon that question here. The original arrest, directed by the defendant, was unauthorized, and the nonsuit herein was therefore improperly granted. This conclusion renders it unnecessary to examine other questions raised in the case. Perhaps it should be further remarked that the case, as presented on this appeal, does not appear to be one of serious enormity. The good faith of the defendant, in issuing the warrant, is not denied. The plaintiff was in no way seriously oppressed; on the contrary, was allowed great liberty after his arrest, and during the examination, and finally submitted to be committed, rather than give bail, which it seems was easily to be obtained. Whether or not the plaintiff may recover more than nominal damages is for a jury to determine. The order appealed from denying a new trial must be reversed.

LEARNED, P. J., and BOARDMAN, J., concurred.

SCAVAGE v. TATEHAM.

(Court of Common Pleas, 1601. Cro. Eliz. 829.)

False imprisonment in London from the 10th September unto the 29th September. The defendant justifies, for that he was mayor and justice of peace in Pomfrait, and that robbery was done there, and the plaintiff was thereof suspected, and brought before him; et quia videbatur suspectuosus, he detained him in his house during that time in the declaration mentioned, to examine him and one Pole, who was not apprehended, concerning the said robbery; and afterwards, upon the 29th September, delivered him over to the new mayor; and traverseth the imprisonment in London.

And it was thereupon demurred; and adjudged, that the inducement to the traverse was not good; for a justice of peace cannot detain a person suspected in prison but during a convenient time, only to examine him, which the law intends to be three days, and within that time to take his examination, and send him to prison; for he ought not to detain him as long as he pleaseth, as he here did eighteen days; neither ought he to detain him in prison in his own house, but he is to commit him to the common gaol of the county; for otherwise, when the justices come to deliver the gaol, he is not in the gaol, and may not be delivered, and so should lie longer than is reasonable. Vide St. 5 Hen. IV, c. 10; 2 Edw. IV, c. 8. And here he took not any examination, but delivered him over to the new mayor without examination, which was not lawful. And therefore it was adjudged for the plaintiff.

CHARGE TO THE GRAND JURY.

(Somersetshire Assizes, 1849. 2 Car. & K. 845.)

At the Taunton assizes, April 2, 1849, Lord DENMAN, C. J., in his charge to the grand jury, said:

In all cases in which prisoners charged with felony have witnesses, and those witnesses are in attendance at the time of the examination before the magistrate, I should recommend that the magistrate should hear the evidence of such witnesses as the prisoner, on being asked, wishes to be examined in his defense. If such witnesses merely explain what has been proved in support of the charge, and are believed, they will actually have made out a defense on behalf of the accused, and there would of course be no necessity for any further proceedings; but if the witnesses so called contradict those for the prosecution in material points, then the case would be properly sent to a jury to ascertain the truth of the statements of each party; and the depositions of the prisoner's witnesses being taken and signed by them, should be transmitted to the judge, together with the depositions in support of the charge.

HEPLER v. STATE.

(Supreme Court of Wisconsin, 1878. 43 Wis. 479.)

This was a prosecution for selling intoxicating liquors without license.[2] * * *

RYAN, C. J. It has been too long and too well established for discussion that the justice's conviction must appear on its face to be within his jurisdiction.

Section 5, c. 121, Rev. St., amended by chapter 35 of 1868, requires that the justice, on the return of the warrant with the accused, shall proceed to hear, try and determine the case within one day, unless continued for cause. This provision must receive a reasonable construction. It cannot be construed to impose impossibilities upon the justice, or to require him to dispose, within one day, of a case necessarily occupying more than one day in hearing. The necessary length of a case would be cause for its continuance from day to day. Other causes might warrant a longer continuance. But the statute does require the justice to hear, try and determine the case of a prisoner brought before him within the day, unless it be continued for cause. The justice's jurisdiction can survive the day by continuance only. If more than one day intervene between the return and the judgment, the conviction must show the continuance for cause; perhaps the cause itself.

The justice's docket here shows an interval of some three days between the return and the judgment, and does not show any continuance. This is fatal. The jurisdiction of the justice to convict appears on the face of the proceeding to have been lost before the conviction.

The justice, indeed, undertakes to connect the day of his judgment with the day of the return by stating that he rendered judgment immediately. This will not do. It rather repels than imports a continuance. It is but the justice's application to the case of a very elastic word (Richardson v. End, 43 Wis. 316), and can be held to signify no more than the justice did, in what he considered a reasonable time, that which the statute requires him to do on the day of the return.

The judgment of the court below is reversed, and the defendant discharged.

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[2] Part of the statement of facts is omitted.

CHAPTER VII

BAIL

REX v. DALTON.

(Court of King's Bench, 1731. 2 Strange, 911.)

The defendant had the misfortune to kill his schoolfellow at Eton. And being brought up by habeas corpus to the Chief Justice's house, it was returned, that he was committed by the coroner for manslaughter. It was therefore prayed he might be bailed. But the Chief Justice said, that was no reason, for if the depositions made it murder, he would not bail;[1] e contra, if they amounted only to manslaughter, he would bail, though the coroner's inquest had found it murder. And he said the distinction was between the coroner's inquest, where the court can look into the depositions, and an indictment, where the evidence is secret. Lord Mohun's Case in Salk. 104, was in point (though that was at Holt's chamber, and not in court as the book reports it) and that the lords bailed him after an indictment for murder was found. He said that himself refused to bail Mr. Clifton, because he thought the depositions made it murder, though the inquest was manslaughter only.

The bail were four in £4,000. The Chief Justice said, it had been usual to take them in a sum, or body for body; and that where they are taken corpus pro corpore, it was a mistake to imagine the bail were to be hanged if the principal ran away; but that the method is to amerce them.

REX v. JUDD.

(Court of King's Bench, 1788. 2 Term R. 255.)

The defendant was brought up on this day by a writ of habeas corpus, from Hertford, in order to be bailed.[2] * * *

ASHHURST, J. However improper the defendant's conduct appears to have been upon the proceedings before the justices, yet unless it appears, upon the face of the commitment itself, that the defendant is charged with a felony, we are bound by the habeas corpus act to discharge him; taking such bail for his appearance to take his trial as we in our discretion shall think fit, according to the circumstances of the case. And therefore the question is, whether there is specified in this commitment such an offense as amounts to felony? It is admitted that neither of the two first charges in the commitment amounts to felony. With respect to the last charge, it is not that the defendant was an accessory with Rand in feloniously, but only with willfully and maliciously, setting fire to a parcel of unthreshed wheat. And though it is not necessary that the word "feloniously" should be used in the commitment, yet it ought to appear on the facts stated to be in law a felony, and within the description of the act. Now the statute has only made it felony to set fire to a cock, mow, or stack, of corn; and the defendant is not charged with either of these. Whatever words the Legislature used, we must suppose that they knew the meaning of them; and if a justice uses the same words, we are bound to suppose that he intended them in the same sense; but if he makes use of other words, he must be more precise.

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[1] Accord: Murder. Reg. v. Chapman, 8 C. & P. 558 (1838). Rape. Reg. v. Guttridge, 9 C. & P. 228 (1840).

[2] Part of the statement of facts and the opinion of Grose, J., are omitted.

Now here a parcel of corn is too indefinite a description. It does not come within the description of the act, and we cannot say how much it is. Twenty ears of wheat is a parcel. Therefore I am of opinion that, as the warrant of commitment does not charge the defendant with a felony, we are bound to bail him. With regard to the quantum of the bail, although the nature of the defendant's crime is not very accurately stated, yet as sufficient appears on the depositions, returned with the commitment, to shew that he has at least been guilty of an enormous offense, I think we ought to take ample security for his appearance; and that he himself should be bound in £1,000. and four sureties in £500. each.

REX v. KIMBERLEY.

(Court of King's Bench, 1729. 2 Strange, 848.)

The defendant was brought up by habeas corpus, being committed to Woodstreet-Counter, for feloniously marrying Bridget Reading, contrary to an Irish act of Parliament, 6 Anne, in order to be transmitted to Ireland to be tried, the offense being committed there.

Strange moved that he might be discharged or bailed, insisting that justices of the peace in England are confined to act only as to such offenses as are against the laws of England, and committed in England; and the proviso in the habeas corpus act gives no power as to offenses in Ireland, but leaves it on the former practice.

Sed Per Curiam. It has been done in Colonel Lundy's Case, 2 Ven. 314, and in 3 Keb. 785, the court refused to bail a man committed for a murder in Portugal. If application is not made to have him sent over in a reasonable time, you may apply again.

Thereupon the defendant was remanded, and upon application to the Secretary of State, it was referred to Mr. Attorney General, to consider of the manner of sending him over; and upon an attendance by counsel, Mr. Attorney reported, that he might be taken from the Counter by a messenger, who should have a warrant to carry him to Ireland, whither he was carried, ~~tried,~~ condemned, and executed.

REX v. WYNDHAM.

(Court of King's Bench, 1715. 1 Strange, 2.)

The defendant Sir William Wyndham being brought up by the lieutenant of the Tower, Serjeant Pengelly, Mr. Jeffries, Mr. Reeve and Mr. Hungerford moved that he might be admitted to bail, and offered several arguments to induce the court to bail him, which, with the answers given thereto by Sir Joseph Jekyll, Mr. Attorney and Solicitor, are comprised in the opinion of the court, which was delivered the last day of the term, ut sequitur:

Parker, C. J. This is a commitment by the Secretary of State for high treason generally; it has been moved on behalf of Sir William Wyndham that he might be admitted to bail. I shall take notice of the arguments on both sides, and of the particular circumstances of this case, which have been laid before the court, with as much clearness as the little time we have had to consider of the matter since it was spoke to, and the extraordinary business of this day, will permit me.

It has been admitted on all hands that the court has a discretionary power in this case; and I think the arguments which have been made use of by the counsel of Sir William Wyndham are upon these five points:

1. Exception: That the commitment is, that he shall be kept safe and close; it has been insisted, this is more than can be justified by law. This exception is offered without any authority to support it, and is against an infinite number of precedents. But admitting this were a good exception, the consequence would not be that we should discharge Sir William Wyndham, but only qua tenus his being kept close. The keeping him safe, is only by way of admonition to the officer, to put him in mind of his duty, and the punishment which he must undergo in case of an escape. The common process which goes to the sheriff, commands him to take the defendant et eum salvo custod.'

2. Exception has been taken: That the charge is not said to be upon oath; and if a Secretary of State might commit people without oath, the whole nation would be their tenants at will. In answer to this, I must observe, as I did before, that the precedents are many of them so, and no authority has been cited in support of the objection. The not mentioning it to be upon oath, is not conclusive that it was not upon oath. In Ferguson's Case this exception was overruled, Trin. 2 W. & M. and it was held in Kendal's Case, that an imprisonment may be without oath; and also in the House of Lords, that

commitments may be without oath. If a man be taken with treasonable papers, he may be committed, and any magistrate may commit super visum, without oath.

3. Exception: That the commitment is generally for high treason; and it has been urged, that some particular species of treason must be expressed, and that it must have so much certainty, as to appear to be high treason to the court. 2 Inst. 52, 591. I think this opinion is not to be maintained. We presume a magistrate does right, till the contrary appears; and it has never been held necessary to express the overt act in the commitment. My Lord Coke puts the case of treason contra personam regis, and admits that to be sufficient.

4. It has been argued in favor of this last exception, that the habeas corpus act supposes the crime to be specifically mentioned; because it provides, that no person shall be committed a second time for the same offense, after he has been once bailed; the consequence of which is, that the court must judge by the two commitments whether the offense be the same. This argument will appear of little weight, if we consider how easy it is to vary the expression in the second commitment, and yet keep close to the principal charge. Suppose a man is committed for levying war against the king, and after he is discharged is again committed for compassing the death of the king. These two facts appear very different upon the face of the commitments, and yet he that is charged with the one, may likewise be charged with the other; and if this objection should be held good, the consequence would be, that a man may be committed as often as the Secretaries of State can vary the expression; for several species of treason may be the same fact.

5. The Case of Kendal and Roe, 1 Salk. 347, 5 Mod. 78, has been relied upon by the counsel of Sir William Wyndham as a case in point. But I am of opinion, it will not come up to that now before us. They were committed by a warrant dated 24 Oct., 1695, being charged with the assisting to the escape of Sir James Montgomery, who was guilty of high treason. Exception was taken, that the treason of Sir James Montgomery was not expressed in the warrant; and the fact he was committed for might not be high treason, though mentioned to be so. The case did not turn upon that single point, for it was held necessary, that Sir James Montgomery should be averred guilty of, and committed for high treason. And because both those particulars were not expressed in the warrant, the defendants were admitted to bail. A commitment, it is true, for stealing fruit generally would not be good, because if it was upon trees it would be no felony. 2 Inst. 52.

There is a case in Anderson, which was to be a direction for the future in making commitments, which is entered in the council book. In Crofton's Case, which is reported in 1 Sid. 78, 1 Keb. 305, it was resolved, that a commitment for high treason generally is good. Vaugh. 142.

I think I have now taken notice of all the exceptions taken to the commitment. The next thing relied upon is the illness of Sir William Wyndham, which appears to be a distemper incident to the family. We are of opinion, that this is not ground enough singly, to induce the court to admit Sir William to bail; for it must be a present indisposition, arising from the confinement; and so we held this term in the Case of Mr. Harvey of Combe, who stabbed himself after his examination; and was refused to be bailed, because his illness was from an act of his own. But I shall not enlarge upon this head, since we are all of opinion Sir William Wyndham ought to be bailed. There have been four terms passed since his commitment, and one assizes in Somersetshire, out of which county it has been hinted the ground of the complaint against Sir William Wyndham arises; and therefore, there being no prosecution against him, he must be admitted to bail, himself in £10,000. and four sureties in £5,000. each.

REGINA v. RIDPATH.

(Court of Queen's Bench, 1713. 10 Mod. 152.)

A recognizance was entered into by Ridpath, with securities, whereby he was bound to appear the first day of the term ad respondendum, etc., in the meantime to his good behavior, and not to depart without the license of the court.

An information was preferred against him by the Attorney General; to which information, by reason of some defect in the pleading, the Attorney General thought fit to enter a nolle prosequi, and then the Attorney General exhibited another.

It was insisted in favor of Ridpath and his securities:

First. That the words "ad respondendum" must be extended to those crimes only, the suspicion of which was the cause of his commitment and entering into the recognizance, and not to the crimes he should afterwards commit, or be charged with; for then it would be utterly impossible for a man to get anybody to be bound in a recognizance with him; an opinion of the innocence of the person, as to the crime charged, being probably the only motive that can be sufficient to induce men to become bound for others.

Secondly. That "ad respondendum" refers to the first day of the term, when he was bound to appear.

Thirdly. That the entering of a nolle prosequi was a bar to the offense contained in the information; at least that it was a discharge from any further prosecution for it; and that it was all one, whether he was discharged from the recognizance by rule of court made for that purpose, or by a judgment, that by a necessary consequence amounted to a discharge.

But The Court were of opinion, that the recognizance extended to all crimes whatever which he should be charged with; and that if it had relation to any particular crime only, it must be mentioned in the recognizance; but that is only "ad respondendum" generally. That there was no such inconvenience as was pretended; the bail in this case being bound in a sum certain, and not to stand in the place of the principal, as in civil cases; that the person's not appearing according to his recognizance, his absence (be the cause or reason of it what it will) was the cause of the forfeiture of the recognizance. That anciently in special bail in civil actions, where the bail is to stand in the place of the principal, bail to one action was to stand bail to all actions that he should be charged with when in court. That this was hard in case of special bail, and is therefore now altered, though altered only by rule of court; and that as to common bail the law is still the same. That the nolle prosequi was neither a bar nor discharge.[3]

GRESHAM v. STATE.

(Supreme Court of Alabama, 1872. 48 Ala. 625.)

B. F. Saffold, J.[4] The appeal is from a judgment absolute on a forfeited bail bond.

On the 15th of March, 1871, the appellants entered into an obligation of bail, in the form prescribed by section 4239 of the Revised Code, for the appearance of William M. Gresham at the next term of the circuit court, to answer a charge of manslaughter. * * *

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[3] Accord: State v. Randolph, 22 Mo. 474 (1856); People v. Gillman, 125 N. Y. 372, 26 N. E. 469 (1891). Cf. State v. Bryant, 55 Iowa, 451, 8 N. W. 303 (1881).

So, where the recognizance specifies the offense for which the accused is to appear and answer, if it also provides that the defendant shall not depart without leave, it is not an answer to say that the defendant might have obtained his discharge from the court, either because nothing was alleged against him by indictment, or because he was not indicted for the same offense as that upon which he had been bound over. Commonwealth v. Teevens, 143 Mass. 210, 9 N. E. 524, 58 Am. Rep. 131 (1887). Or that the grand jury had returned "no bill." State v. Fitch, 2 Nott. & McC. (S. C.) 558 (1820). Or that the accused had previously been acquitted on an indictment for the same offense. Archer v. Commonwealth, 10 Grat. (Va.) 627 (1854). Or even that he had been tried and found not guilty. An order of the court discharging him is requisite. State v. Stout, 11 N. J. Law, 124 (1829).

If the recognizance is only for an appearance at the next term of the court, bail are discharged when they produce the defendant at that term, and the court cannot, against the express dissent of the bail, respite the recognizance to a subsequent term. People v. Clary & Fleming, 17 Wend. (N. Y.) 374 (1837); Keefhaver v. Commonwealth, 2 Pen. & W. (Pa.) 240 (1830). If, after a recognizance is entered into, the accused is arrested on a bench warrant issued upon an indictment for the same offense and he subsequently escapes, his bail are discharged. People v. Stager, 10 Wend. (N. Y.) 431 (1833).

[4] Part of this case is omitted.

No indictment for manslaughter appears to have been found against the defendant, but he was indicted at the spring term, 1871, for the murder of Thomas W. Ivey. At the fall term, 1871, the said defendant, not having been before arrested, came into court and surrendered, whereupon an alias capias was immediately issued and he was formally arrested. * * *

The essential statement which the entry of the conditional judgment should contain is that the accused was required to answer the charge which the recognizors have stipulated that he should answer. This is necessary to show a breach of the bond. If the accused is required to answer a charge variant from that described in the condition of the bail bond, this will not show a breach. Howie & Morrison v. State, 1 Ala. 113; State v. Weaver, 18 Ala. 293.[5] Section 4245 of the Revised Code provides that the undertaking is forfeited by the failure of the defendant to appear, although the offense is incorrectly described in such undertaking; the particular case or matter to which the undertaking is applicable being made to appear to the court. This of course applies to such misdescriptions as, nevertheless, apprise the parties of the nature of the offense for which the indictment is to be preferred; the same being indictable. It must also be taken to apply to cases in which the indictment embraces or includes the particular indictable offense mentioned in the undertaking of bail. While it would be manifestly unjust to hold a bail bond forfeited because the accused did not appear to answer an indictment for an offense altogether different, and not even suggestive of the one mentioned in it, it would be equally unreasonable ~~to let him go free~~ because the grand jury deemed his conduct ~~more wicked~~ in degree than the magistrate. He would well know that a charge of manslaughter might result in an indictment for murder.

But the judgment nisi does not state that the accused was indicted for any offense. This is a fatal omission. There could be no failure to appear without a demand for appearance, and without an indictment there could be no demand, and consequently no breach. Hall v. State, 15 Ala. 431; Badger & Clayton v. State, 5 Ala. 21.

As the accused was on bail, the clerk was at liberty to make a minute entry of the indictment. Rev. Code, § 4148. If the conditional judgment had stated an indictment for murder, we think there would have been a forfeiture of the bond by the failure of the accused to appear, notwithstanding the stipulation for a case of manslaughter.

The alias sci. fa. to W. M. Gresham was defective also in not stating a default.

The judgment is reversed, and the cause remanded.

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[5] Accord: Gray v. State, 43 Ala. 41 (1869); People v. Hunter, 10 Cal. 502 (1858).

DEVINE v. STATE.

(Supreme Court of Tennessee, 1858. 5 Sneed, 623.)

McKinney, J.[6] * * * At the May term, 1856, of the circuit court of Monroe, the plaintiff in error, and one Hensley, entered into recognizance in the sum of fifteen hundred dollars, for the appearance of one Morgan, at the next term of the court, to wit, the September term, 1856, to answer a charge "for passing counterfeit bank bills," of which he stood indicted in said court. Morgan failed to appear, and a judgment nisi was rendered against his bail. Two writs of scire facias were issued thereon, both of which were served on the plaintiff in error, and returned "not found" as to Hensley.

Devine pleaded, among other matters not necessary to be noticed, in substance, that after their undertaking for his appearance, and before the ensuing term, at which he was required to appear, Morgan was arrested in Henderson county, North Carolina, upon a charge of felony committed in said county and state, and was in custody of the sheriff upon said charge of felony at the time the forfeiture, in the scire facias mentioned, was taken against his bail, whereby the appearance of said Morgan was prevented, etc.

To this plea there was a demurrer, which was sustained; and this is assigned for error.

The judgment on the demurrer was correct. The plea is bad.

First. It may be true, as alleged in the plea, that, at the time the judgment nisi was rendered against the bail, Morgan may have been in confinement, in another state; and it may also be true that, before the final judgment on the scire facias, which was at January term, 1858, he may have been discharged, and at liberty to appear. If it were conceded, therefore, that the arrest of Morgan, in another state, might constitute a good defense for the bail, the plea is essentially defective, because it does not show that the bail might not have surrendered him at a time subsequent to the judgment nisi, and before final judgment.

Secondly. But we are of the opinion that the arrest and imprisonment of the principal in another state, or government, for an offense committed in the latter place, after the recognizance entered into here, is no excuse for the failure of the bail to surrender him at the time and place stipulated. In legal contemplation, upon the recognizance being entered into, the principal was delivered into the "friendly custody" of his sureties, instead of being committed to prison. 4 Bl. Com. 301. The sureties had control of his person; they were bound at their peril, to keep him within the jurisdiction, and to have his person ready to surrender when demanded. If apprehensive for their own safety, they had the right to arrest and commit him to prison, at any time, so as to have him forthcoming to answer the charge of which he had been indicted, as they had voluntarily undertaken to do. And if they negligently permitted him to go beyond their reach, it was their own folly, and they must abide the consequences.

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[6] The statement of facts is omitted.

The case of State v. Allen, 2 Humph. 258, to which we have been referred, is very different from this. In that case it was very properly held that, inasmuch as the state, through the action of the executive department of the government, had taken the principal out of the hands of the sureties, and delivered him to the authorities of a foreign state, thereby placing it beyond the power of the sureties to surrender him, the state was precluded from exacting the forfeiture in the face of its own act.

In the case before us, the failure of the sureties to surrender their principal was, in view of the law, the result of their own negligence, or connivance, in suffering their principal to go beyond the jurisdiction of the court, and from under their control.

Judgment affirmed.[7]

GRAVES v. PEOPLE.

(Supreme Court of Illinois, 1850. 11 Ill. 542.)

TREAT, C. J.[8] There is a fatal objection to the scire facias. The recognizance was conditioned for the appearance of William H. Graves. An indictment was presented against Harrison Graves, and a forfeiture of the recognizance entered for his nonappearance. This does not show any breach of the obligation. If the facts of the case warranted it, there should have been an averment in the scire facias that Harrison Graves was the same person who entered into the recognizance by the name of William H. Graves. As the scire facias shows no cause of action, the judgment must be reversed; but another scire facias, containing proper averments, may be prosecuted.

Judgment reversed.

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[7] Accord: Cain v. State, 55 Ala. 170 (1876); State v. Horn, 70 Mo. 466, 35 Am. Rep. 437 (1879); Yarbrough v. Commonwealth, 89 Ky. 151, 12 S. W. 143, 25 Am. St. Rep. 524 (1889); King v. State, 18 Neb. 375, 25 N. W. 519 (1885). But where the bail allow the accused to go into another state and while there he is, after the forfeiture of the recognizance, delivered on the requisition of the Governor of a third state for a crime committed (without the knowledge of the bail) in said state, and is imprisoned in such state on conviction, the bail are not discharged from liability on their recognizance in a suit by the state where the accused was first arrested. Taylor v. Taintor, 16 Wall. 346, 21 L. Ed. 287 (1872). Where the condition of the recognizance becomes impossible by the act of God or of the law, or of the obligee, the default is excused; hence the death of the accused (Merritt v. Thompson, 1 Hilt. [N. Y.] 550 [1858]), or his imprisonment at the date of appearance by authority of the state (People v. Bartlett, 3 Hill [N. Y.] 570 [1842]), excuses the bail; but sickness of the accused (State v. Edwards, 4 Humph. [Tenn.] 226 [1843]; Piercy v. People, 10 Ill. App. 219 [1881]. [Contra: People v. Tubbs, 37 N. Y. 586 [1868])], or his insanity (Adler v. State, 35 Ark. 517, 37 Am. Rep. 48 [1880]) has been held not to be such an act of God as will excuse the bail.

[8] Part of this case is omitted.

CHAPTER VIII

THE GRAND JURY

The sheriff of every county is bound to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things which on the part of our lord the king shall then and there be commanded them. They ought to be freeholders, but to what amount is uncertain; which seems to be casus omissus, and as proper to be supplied by the Legislature as the qualifications of the petit jury, which were formerly equally vague and uncertain, but are now settled by several acts of Parliament. However, they are usually gentlemen of the best figure in the county. As many as appear upon this panel are sworn upon the grand jury to the amount of twelve at the least, and not more than twenty-three; that twelve may be a majority, which number, as well as the constitution itself, we find exactly described so early as the laws of King Ethelred: "Exeant seniores duodecim thani, et præfectus cum eis, et jurent super sanctuarium quod eis in manus datur, quod nolint ullum innocentem accusare, nec aliquem noxium celare."

In the time of King Richard the First (according to Hoveden) the process of electing the grand jury ordained by that prince was as follows: Four knights were to be taken from the county at large, who chose two more out of every hundred, which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably found too large and inconvenient; but the traces of this institution still remain in that some of the jury must be summoned out of every hundred. This grand jury are previously instructed in the articles of their inquiry by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor, and they are only to hear evidence on behalf of the prosecution; for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment so far as their evidence goes, and not to rest satisfied merely with remote probabilities, a doctrine that might be applied to very oppressive purposes.

The grand jury are sworn to inquire only for the body of the county, pro corpore comitatus; and therefore they cannot regularly inquire of a fact done out of that county for which they are sworn, unless particularly enabled by an act of Parliament.

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill "Ignoramus," or, "We know nothing of it," intimating that, though the facts might possibly be true, that truth did not appear to them; but now they assert in English more absolutely "Not a true bill," or (which is the better way) "Not found," and then the party is discharged without further answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then indorse upon it "A true bill," anciently "Billa vera." The indictment is then said to be found, and the party stands indicted. But to find a bill there must be at least twelve of the jury agree, for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offense, unless by the unanimous voice of twenty-four of his equals and neighbors; that is, by twelve at least of the grand jury, in the first place, assenting to the accusation, and afterwards by the whole petit jury of twelve more finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree; and the indictment, when so found, is publicly delivered into court.

4 Black. Comm. 302 et seq.

ANONYMOUS.

(Court of King's Bench, 1352. 27 Liber Assisarum, pl. 63.)

One G. was indicted in the King's Bench for that being one of the enditors that indicted certain persons of divers felonies, they sued him for betraying the counsel of the King, for that he had openly shown to others what things the said persons were indicted for, and thus betrayed the counsel of the King. For this he was arraigned as of felony. And Shardelow—some judges would hold it treason, but he was arraigned only of felony, and was acquitted. Quære, what would have been the judgment if he had been convicted?

STATE v. WOOD.

(Supreme Judicial Court of New Hampshire, 1873. 53 N. H. 484.)

SARGENT, C. J.[1] * * * The calling the foreman of the grand jury to testify what the evidence was before that jury, we think, was also justified by the authorities. In 1 Chit. Cr. Law, § 317, it is said that the true object of the secrecy required of the grand jury is to prevent the evidence produced before the grand jury from being counteracted by subornation of perjury on the part of the defendant, and that, when a witness upon the trial swears differently from what he did before the grand jury, they (the grand jurors) may inform the judge, who may cause the witness to be prosecuted for perjury on the testimony of the grand inquest. See, also, 4 Black. Com. 126, and note by Christian; 2 Russell on Crimes, 912. In Tompson v. Mussey, 3 Greenl. (Me.) 305, it was proved what the testimony was before the grand jury; but it is not clear whether by the prosecuting officer alone or by the aid of the jurors. But in Low's Case, 4 Greenl. (Me.) 439, 16 Am. Dec. 271, the testimony of the grand jurors was received, not so much to show what the testimony was, as to show that twelve of the jurors did not concur in finding the bill of indictment. And it was held, contrary to the general holding on that subject, that a case for the defendant might be made out in that way—which was going much further than the present case. In 1 Wharton's Am. Cr. Law (6th Ed.) § 508, this matter is discussed, and the authorities cited and commented on, from which I judge the weight of authority now to be that a grand juror may be compelled to testify—when necessary to promote the cause of justice—what the witnesses before the grand jury testified to, either to contradict such witnesses, or otherwise.

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[1] Part of this case is omitted.

In Commonwealth v. Mead, 12 Gray (Mass.) 167, 71 Am. Dec. 741, the question arose in its present form, whether the testimony of grand jurors is admissible to prove that one of the witnesses in behalf of the prosecution testified differently before them from the testimony before the trial jury. In the opinion, Bigelow, J., says: "As to the competency of such evidence, the authorities are not uniform. The weight of it is in favor of its admissibility. On principle, it seems to us to be competent." He then states the grounds of his opinion, which seem to us quite satisfactory and sufficient. Such is the opinion of Mr. Bishop, as expressed upon a review and examination of the authorities on that subject. 1 Bish. Criminal Procedure (1st Ed.) § 730. I think the practice in this state has been the same way.

We think this exception must be overruled. * * * [2]

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[2] Accord: Crocker v. State, Meigs (Tenn.) 127 (1838); Gordon v. Commonwealth, 92 Pa. 216, 37 Am. Rep. 672 (1879). Also to prove that a certain witness did not testify before the grand jury. Commonwealth v. Hill, 11 Cush. (Mass.) 137 (1853). Or to prove what persons were examined before the grand jury. Ex parte Schmidt, 71 Cal. 212, 12 Pac. 302 (1886). A fortiori, a witness may testify as to what he stated before the grand jury. Reg. v. Gibson, Car. & M. 672 (1842). Or one witness may testify as to what another witness so stated. Reg. v. Hughes, 1 Car. & K. 520 (1844).

REGINA v. RUSSELL.

(Central Criminal Court, 1842. Car. & M. 247.)

The prisoner was indicted for feloniously assaulting ——— Abraham on the 21st of December, and cutting and wounding him on his head, left eyebrow, and nose, with intent to do him some grievous bodily harm.

The prosecutor and several of the witnesses for the prosecution were Lascars, and C. Phillips, before the jury were charged, intimated to the judges that there was some doubt as to whether those witnesses had been properly sworn to give evidence before the grand jury.

Gurney, B., and Wightman, J., were both of opinion that that was a matter which they ought not to inquire into, and also that the mode of swearing the witnesses to go before the grand jury would not, if incorrect, vitiate the indictment, as ~~the~~ grand jury were at liberty to find a bill upon their own knowledge merely, ~~and were~~ anciently in ~~the habit of doing~~ so. And Wightman, J., added that the same point had arisen lately on the Northern circuit, before Lord Denman and himself, and they, after considering the subject, were of the same opinion as had been expressed to-day.

The trial proceeded, and the prosecutor and such witnesses as were Lascars having been sworn in the manner which they considered binding—

The prisoner was eventually convicted of an assault, and sentenced to be imprisoned for eight days.[3]

BOONE v. PEOPLE.

(Supreme Court of Illinois, 1894. 148 Ill. 440, 36 N. E. 99.)

Phillips, J.[4] The assignment of error first alleged is in overruling defendant's motion to quash the indictment, which was based on the fact that defendant was taken from the jail, and examined as a witness before the grand jury that found the indictment against him, and was compelled to testify before said grand jury regarding his guilt ~~or innocence.~~ That motion is supported by the affidavit of the defendant. The grand jury constitute a part of the court, and their official acts in finding true bills or ignoring bills are borne on the records of the court, and witnesses sworn before that body are sworn in open court, though not necessarily in the presence of the judge. 1

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[3] Accord: State v. Wilcox, 104 N. C. 847, 10 S. E. 453 (1889); State v. Lee, 87 Tenn. 114, 9 S. W. 425 (1888); State v. Terry, 30 Mo. 368 (1860); Commonwealth v. Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302 (1893).

[4] Part of this case is omitted.

Bish. Crim. Proc. § 868. By section 10 of article 2 of the Constitution of the state of Illinois it is declared: "No person shall be compelled in any criminal case to give evidence against himself." When the disqualification of a defendant in a criminal case, as a witness in his own case, was removed by section 486 of the Criminal Code of Illinois, it was expressly provided that "a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect."

The provision of the statute and the positive inhibition of the Constitution alike preclude the right of the grand jury or any court to call upon the defendant, and, in the first place, to make him a witness, and require him to give evidence against himself. It is of the highest degree of interest, and most important to preserve that peculiar excellence of the common-law system which has never allowed a proceeding to establish guilt to be inquisitorial. The affidavits in the record show that the defendant was taken from the jail, where he was held in custody, and taken before the grand jury, where he was examined touching the very matter on which that grand jury found an indictment against him, and on which he was placed on trial. A right of the highest character was violated. A privilege sacredly guaranteed by the Constitution was disregarded, and a dangerous innovation on the uniform practice in this state made; a danger so great, if it once became a rule of law that one ignorant of his rights, and it may be also of his danger, unattended by counsel and unprotected by a court, could be called before a grand jury and interrogated, and, as he may believe, compelled to answer to charges made against him on a subject-matter of investigation then before that body in which his interest is vital, that we will not stop to inquire into the question as to whether the indictment was found on that testimony alone, or whether that testimony influenced the finding, where, as here, the defendant is in custody charged with a crime, and while so in custody is taken from the jail to be examined about that subject-matter. It is sufficient that so important a right was violated, and such a proceeding had, where an indictment was found under such circumstances.

But, were that otherwise, it does not appear that any other evidence was heard before that grand jury on which this indictment was found. We do not hold that where one is before the grand jury as a witness, and at that time is not charged with crime, and may incidentally be interrogated about a matter to which he makes answer, and an indictment is afterwards found against him, that would require the indictment to be quashed; nor do we hold that every case where one is before the grand jury as a witness, and interrogated about a matter for which he afterwards may be indicted, would be of itself sufficient cause to quash the indictment. But in this case it does not appear that the grand jury examined any other witnesses, nor does it appear the indictment was not found on the evidence of the defendant alone. No affidavits are filed by the state's attorney on that question; and where, as here, the defendant charged with crime is taken from the jail before the grand jury, and interrogated about the matter with which he is charged with crime, such an error must be held fatal to the indictment. It was error to overrule the motion to quash the indictment. State v. Froiseth, 16 Minn. 296 (Gil. 260). * * *

Reversed and remanded.[5]

STATE v. SEABORN.

(Supreme Court of North Carolina, 1833. 15 N. C. 305.)

Ruffin, C. J.[6] * * * The second objection to the grand jury is that in the record one Joel Jones is named as one of the grand jurors sworn, while the list returned contained no such person, but one of the name of Joes Jones. This differs from the former objection in this: That here the facts which it is alleged constitute the error do appear in the record; whereas the first error was supposed to consist in the silence of the record upon certain facts. It is insisted that the grand jury must be composed only of those summoned, and that if one be impaneled on it by a different name from all those summoned, he must be taken to be a different person, and the bill is not well found.

This objection, if founded in fact and taken in due season in the superior court, would, in my opinion, have been unanswerable; and had it then been overruled, it would have been error. But this I am saying as a mere dictum; for, admitting the exception to have been once sufficient, the question remains whether the case was open to it when it was actually taken, which is the point of the present decision.

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[5] While there must be legal and competent evidence before the grand jury to sustain an indictment (People v. Lauder, 82 Mich. 109, 46 N. W. 956 [1890]), the authorities generally agree that an indictment is not vitiated merely because the grand jury examined incompetent witnesses (State v. Wolcott, 21 Conn. 272 [1851]; State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270 [1850]; Bloomer v. State, 3 Sneed [Tenn.] 66 [1855]), or considered improper evidence (Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460 [1881]; State v. Logan, 1 Nev. 509 [1865]), or required a witness to give improper evidence, e. g., to testify against himself (People v. Lauder, 82 Mich. 109, 46 N. W. 956 [1890]. [Contra: State v. Froiseth, 16 Minn. 296, Gil. 260 [1871]).] The sufficiency of the evidence before the grand jury will not be inquired into (Stewart v. State, 24 Ind. 142 [1865]; United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134 [1852]), at least if it appear that there was any legally competent evidence before them (Washington v. State, 63 Ala. 189 [1879]; State v. Logan, 1 Nev. 509 [1865]).

In the absence of statutory provisions, it is no objection to the validity of an indictment that one or more of the grand jurors, who were otherwise qualified, had formed or expressed an opinion of the guilt of the accused before the finding of the indictment. Tucker's Case, 8 Mass. 286 (1811); State v. Chairs, 9 Baxt. (Tenn.) 196 (1877). Or that one or more of the jurors were biased or had an interest (not pecuniary) in the case. Commonwealth v. Brown, 147 Mass. 585, 18 N. E. 587, 1 L. R. A. 620, 9 Am. St. Rep. 736 (1888); State v. Rickey, 10 N. J. Law, 83 (1828); Commonwealth v. Strother, 1 Va. Cas. 186 (1811). Or was of kin to the accused or to the prosecutor. State v. Brainerd, 56 Vt. 532, 48 Am. Rep. 818 (1884); State v. Russell, 90 Iowa, 569, 58 N. W. 915, 28 L. R. A. 195 (1894). The general qualifications for grand jurors are very generally provided for by statute.

[6] Part of this case is omitted.

I do not find that it is yet settled in England whether an exception to a grand juror can be taken after verdict, or even after plea to the felony. Perhaps the unequivocal terms of St. 11 Hen. IV, 9, may make it imperative on the court to receive it at any time; since, if well founded, it avoids the indictment ab initio "with all the dependence thereof," which includes, as some suppose, the prisoner's plea in chief and "the verdict." Yet others have held that, although the proceedings be void under the statute, the matter of avoidance must be brought before the court at a proper and at an early stage, namely, before the bill found, by challenge, or by special plea upon arraignment, with a plea over to the felony either then or upon the overruling of the first plea. To that effect is the great authority of Lord Coke (3 Inst. 33, 34); and in Bacon's Abridgment, Juries, A, this is said to be the better opinion. But Serjeant Hawkins afterwards remarks (book 2, c. 25, §§ 23, 26, 27) that it seems yet doubtful how far advantage can be taken of the disqualification of a grand juror after trial. Whatever may be the correctness of this doubt, it is manifest that it depends upon that statute and has no other foundation.

There is nothing to ground it on in this state. The statute of Henry IV is not in force here, because we have legislated for ourselves upon this subject, and have established by many acts a complete system of our own, inconsistent in many respects with that of England. I do not think it necessary to recite our statutes, and content myself with a reference to them. They are the acts of 1779, c. 137, of 1806, c. 693, § 11, and c. 694, of 1807, c. 712, and of 1810, c. 801. A perusal of them must satisfy any mind that all these statutes are directory in their nature. There is not an annulling clause or word in any one of them; and from many of the provisions it must be deduced that no such consequences of an irregularity were intended. If we advert, for instance, to the very particular directions of St. 1806, c. 694, relative to the forming of the jury lists from the tax list, to be furnished by the clerk of the county court; to the writing the names on scrolls of equal size; to the putting them in a box having a certain number of divisions, marks, locks and keys; to the locking the box, the custody of the keys and of the box; and to the drawing of the names by a child under a certain age—when, I say, we advert to these provisions, and also recollect that many of the matters can by no method get into the record of the superior court, and that the statute contemplates that no part of them will get there, by communication from the county court, except the list of jurors to be summoned, that is, the result of all the previous ceremonies, the impression on the mind must amount to conviction that the enactments are merely directory, and, if so, that others upon the same subject in the same statute, or in another statute in pari materia, partake of the same character.

~~But the prevailing consideration is the~~ want of any words importing that the proceeding shall be void, if the directions of the acts be not ~~strictly~~ observed. Upon this ground McEntire's Case, 4 N. C. 267, was decided, and ruled that in this state exceptions to grand jurors must be taken at a period analogous to that for excepting to a petit juror; that is, at the earliest point of time the party could. That to a petit juror must be by challenge when tendered, as has long been settled at common law, and was also here under the same act of 1779 in Oldham's Case, 2 N. C. 450. In strictness, so ought a grand juror to be challenged before he is sworn. Thus it was at common law, and there our acts still leave the case. That was the course, I recollect, in Burr's trial; and the case cited from 9 Mass. 107, Commonwealth v. Smith, rules that, upon a statute of that state, similar to ours, no plea of an irregularity in impaneling the grand jury could be received. But it seems to be agreed in McEntire's Case that the objection may be by plea upon the arraignment; and to that I would adhere, as a fair and convenient method. But I think all objections of the sort are precluded by a plea to the felony. * * *

I am therefore of opinion that both of the objections taken in the first reason in arrest are insufficient and must be overruled. * * * [7]

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[7] Some courts hold that, if accused was in a position to object by challenge either to the array or to a juror, his neglect to challenge on the organization of the jury is a waiver, and he cannot afterward object by motion to quash or by plea in abatement. Musick v. People, 40 Ill. 268 (1866); McClary v. State, 75 Ind. 260 (1881); Fisher v. State, 93 Ga. 309, 20 S. E. 329 (1893). But if he had no opportunity to challenge he may plead in abatement any matter which was sufficient cause of challenge. Pointer v. State, 89 Ind. 255 (1883). Others hold that the accused may except on arraignment. State v. Rockafellow, 6 N. J. Law, 332 (1796); Newman v. State, 14 Wis. 393 (1861). It is too late after verdict (People v. Robinson, 2 Parker, Cr. R. 235 [1855]), or after pleading in bar (State v. Carver, 49 Me. 588, 77 Am. Dec. 275 [1861]; Pointer v. State, 89 Ind. 255 [1883]; State v. Heffernan, 28 R. I. 477, 68 Atl. 364 [1907]), to object to the incompetency of the grand jury.

CHAPTER IX

THE INDICTMENT

SECTION 1.—FORM AND REQUISITES OF THE INDICTMENT IN GENERAL

To indictments there are these exceptions: "Sire, I crave an inspection of the indictment whereby exceptions may accrue to me, as to the person of the indictors and to the manner of the indictment." For serfs can indict no one. Or if the indictment be not made by a complete dozen of free men, or be made by those who cannot indict any one, or be not sealed with the seal of twelve or more jurors and put on record by a judge authorized thereto, or if the indictment make no mention of any particular deed, or be not made within the year and by credible folk of good fame, no one is bound to answer it; nor if it be not made by neighbors of the same county, nor if it be in general words, for a general slander will not defame any one nor force him to answer, as if the indictment be that such an one is a homicide, or a thief, or an evil doer, without saying what particular sin he has committed; for to the empty voice of the people one must not give hearing, credence, or faith.

Or one may say that since the felony was committed there has been an eyre of the justices in which nothing was alleged about it.

Mirror, c. XV, p. 100.

I. The Caption

Touching the forms of indictments, there are two things considerable:

1. The caption of the indictment.
2. The indictment itself.

The caption of the indictment is no part of the indictment itself, but it is the style or preamble, or return that is made from an inferior court to a superior, from whence a certiorari issues to remove.

* * *

1. The name of the county must be in the margin of the record, or repeated in the body of the caption.

2. The court where the presentment is made must be expressed. * * *

3. It must appear where the session was held, and that the place where it was held is within the extent of the commission. * * *

4. The justices' names. * * *

5. The title of their authority. * * *

6. It must return that the indictment was made per sacramentum. * * *

7. It must name the jurors that presented the offense. * * *

8. They must be returned to be probi et legales homines, and de comitatu prædicto. * * *

9. It seems requisite also to add this clause, onerati et jurati ad inquirendum pro domino rege et pro corpore comit' prædict'. * * *

And thus far for the caption of the indictment, where, note: (1) That if the caption be faulty in the form, yet the same term it may be amended by the clerk of the assizes, or the peace, but not in another term.

2 Hale, P. C. c. XXIII.

PEOPLE v. BENNETT.

(Court of Appeals of New York, 1867. 37 N. Y. 117, 93 Am. Dec. 551.)

FULLERTON, J.[1] After the plea of not guilty had been entered, and the trial moved by the district attorney, the counsel for the prisoner made a motion to quash the indictment, because:

1. It did not appear, on the face of the indictment, that it was found or presented by a grand jury.

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[1] Part of this case is omitted.

"In practice, in England, appending the caption is usually a ministerial act, and it is introduced as a part of the record, or return from an inferior to a superior court, from which a certiorari issues. Here the caption is usually drawn with the other parts of the indictment, and is embodied in the instrument returned by the grand jury as a true bill. But we do not think that an insuperable objection to showing, by a certificate, filed in the course of proceedings in a particular case, under the hand of the clerk, the actual time of filing the bill. It might be a good reason why an amendment should not be made of the caption in such cases. * * * The time of finding of the bill may be shown aliunde, when it becomes necessary to show that the bill was found at a day subsequent to the commencement of the session of the court." Dewey, J., in Commonwealth v. Stone, 3 Gray (Mass.) 453 (1855).

"Inasmuch as a prosecution, in this state, is never removed from one to a higher tribunal, a caption can be of no benefit to an indictment, and is uniformly dispensed with." Voorhies, J., in State v. Marion, 15 La. Ann. 495 (1860).

A caption is only necessary where the court acts under a special commission, and a mistake in the caption when the court sits by authority of public law will not vitiate the indictment. State v. Wasden, 4 N. C. 596 (1817).

"Following the cases cited above, we feel it our duty to regard the question as settled in this state, that a caption, such as is described in Reeves v. State [20 Ala. 33], supra, is an essential of a good indictment, and when the question comes before us on appeal, if the record does not contain such caption,

2. Because it did not appear, on its face, that it was found and presented by the requisite number of grand jurors.

3. Because it was not alleged, in the indictment, that the grand jury were charged and sworn by the Court of Sessions to inquire for the people of the state of New York, and for the body of the county of Cortland. * * *

That part of the indictment which is complained of as defective is as follows:

"Court of Sessions, }
"Cortland County. } Cortland County—ss:

"The jurors of the people of the state of New York, in and for the body of the county of Cortland, upon their oaths present."

Then follow apt words charging the defendant with the commission of a larceny. Here are all the requisites of a good commencement to an indictment. It plainly appears to have been found in the Court of Sessions for the county of Cortland, and by the jurors of the people for said county. It is true that it does not allege that it was found by a grand jury, or by the legal number of grand jurors; but these are plainly implied, because that body, legally constituted, alone have the power to present any one for trial. This has been frequently decided. McClure v. State, 1 Yerg. (Tenn.) 206, per Catron, J.

The form of this indictment is identical, mutatis mutandis, with that long since adopted in England, and which has obtained in most of the states in our own country. The form used in England nearly three hundred years ago was "juratores pro domina regina presentant quod," etc. West's Symboleography, pt. 2, p. 96. And it has been continued without exception to the present day. A great deal of confusion, however, exists in the books, because the distinction between the commencement and the caption of an indictment, which has always existed in England, has not uniformly been maintained here. "The whole question as to what a caption should contain," says Bishop, in his treatise on Criminal Procedure (section 154), "appears, when approached through the American books, draped in mist and girded about with darkness."

Observing the proper distinction between the caption and the commencement of an indictment, no valid objection will be found to the one in this case. The caption is no part of the indictment. It consists wholly of the history of the proceedings when an indictment is removed from an inferior to a superior court. As I have already stated, the form of an indictment in many of our own states, and which form is derived from England, is thus: "The jurors of the people of the

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it is fatal error. If it were an open question in this state, it might admit of serious doubt if this doctrine did not have its origin in certiorari proceedings from courts of limited, inferior jurisdiction, and that it should not be applied to records from courts of general jurisdiction." Stone, J., in Goodloe v. State, 60 Ala. 93 (1877).

state of ———, in and for the body of the county of ———, upon their oath present," etc. This is the commencement, and all that it need contain.

The caption is quite a different matter, and it had its origin in this way. Where an inferior court, in obedience to the mandate of the King's Bench, transmitted the indictment to the crown office, it was accompanied with its history, naming the court where it was found, the jurors' names by whom found, and the time and place where found. All this was entered of record by the clerk of the superior court immediately before the indictment, and was called the caption; but it was no part of the indictment itself. Bishop on Cr. Pro. vol. 1, §§ 145, 146; 1 Starkie's Cr. Pl. (2d Ed.) 233. A complete form of the caption is given in Hale's P. C. 165, and in 1 Chitty's Cr. Law, 327.

This same practice prevailed in our state when indictments were removed from the Sessions to the Supreme Court, as will be seen in the case of People v. Guernsey, 3 Johns. Cas. 266, quoted by the respondents.

It often occurred that these captions were defective in the statement of facts sufficient to show that the inferior courts where they were found had jurisdiction. Then followed a motion in arrest of judgment, and decisions as to the requisites of a caption, viz., that it should contain an averment that the indictment, to which it was prefixed, was found by a grand jury of good and lawful men, giving their names, and that they had been then and there sworn and charged, etc. Vide Bishop's Cr. Pro. § 155, vol. 1, note 1. The same doctrine is aptly stated in Burn's Justice, vol. 3, p. 372, in these words: "The caption of the indictment is no part of the indictment itself (2 Hale, 166), but is the style or preamble or return that is made from an inferior court to a superior, from whence a certiorari issues to remove, or when the whole record is made up in form; for the record of the indictment, as it stands upon the file in the court where it is taken, is only thus: The jurors, for our lord, the king, upon their oath, present."

The difficulty in our practice has grown out of the error of regarding these decisions as furnishing a test of what the indictment itself should contain, rather than its caption, when removed to a superior court. The consequence is that, in some of the states, there have been introduced into the commencement of an indictment the averments necessary to make a good caption, thus confounding the two. Bishop's Cr. Pro. § 149, note 2. This has led to great diversity of practice and necessary confusion, and it will be readily seen that the decisions of such states upon these questions have no application here, for the English practice has been adopted in our own state. Barb. Cr. Treatise, 280.

So far, therefore, as the objections in this case go to the form of the indictment, the latter must be considered good. Should an indictment be found in an improper manner, or by an insufficient number of jurors, the way is open for redress by motion, which secures to the accused party immunity from an illegal trial or punishment. State v. Batchelor, 15 Mo. 207, 208; Reg. v. Hearne, 9 Cox, C. C. 433, 436; 10 Jurist (N. S.) 724; 4 Blackstone, 238; Bishop's C. P. § 448. * * *

II. The Statement of the Offense

The parts of an indictment are many. 2. The strictness required in indictments is great, because life is in question. 3. Therefore very nice and slender exceptions have been of latter ages allowed, and they have been with too much facility quashed and reversed. * * *

An indictment is nothing else but a plain, brief, and certain narrative of an offense committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature. * * *

1. Regularly every indictment ought to be in Latin, as all pleadings in the courts ought to be, and it is of excellent use, because, it being a fixed, regular language, it is not capable of so many changes and alterations as happen in vulgar languages. * * *[2]

Regularly false Latin doth not vitiate an indictment, if yet the indictment be reasonably intelligible, * * * as "præfato Reginæ," where it should be "præfatæ." But if the words be words of art, and by omission or misplacing of letters become insignificant, they vitiate the indictment, as "burgariter" for "burglariter," "feloniter" for "felonice," "murdredavit" for "murdravit"; but "burgulariter" hath been held good. 4 Co. Rep. 39 b, Brooks' Case. * * *

So if it make the indictment insensible or uncertain, as if A. and B. be indicted for stealing, "felonice cepit et asportavit," where it should be "ceperunt," it shall be quashed. P. 42 Eliz. B. R. Lane's Case, Cro. Eliz. 754; so in an indictment of murder, the stroke "in sinistro bracio," where it ought to be "brachio," for it appears not where the wound was, the words being insensible. T. 31 Eliz. B. R. Webster's Case, Cro. Eliz. 137.

Abbreviations that are usual are allowable in indictments. * * *[3]
Figures to express numbers are not allowable in indictments. * * *[4]

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[2] This was changed by St. 4 Geo. II, c. 26, and 6 Geo. II, c. 6, which requires all indictments to be in the English language. The use of Latin, it is believed, never obtained in the United States. Bishop, New Cr. Proc. 3342. See People v. Ah Sum, 92 Cal. 648, 28 Pac. 680 (1892).

[3] St. 4 Geo. II, c. 26, and 6 Geo. II, c. 6, prohibit abbreviations in indictments. See and cf. United States v. Reichert (C. C.) 32 Fed. 142 (1887); Commonwealth v. Desmarteau, 16 Gray (Mass.) 1 (1860); State v. Jericho, 40 Vt. 121, 94 Am. Dec. 387 (1868); State v. Kean, 10 N. H. 347, 34 Am. Dec. 162 (1839). Where the presence of abbreviations renders the indictment defective, objection must be taken before verdict. Commonwealth v. Desmarteau, 16 Gray (Mass.) 1 (1860).

[4] It is said to be the better practice to write figures at length than to express them in Arabic characters; but the employment of the latter will

2. An indictment grounded upon an offense made by act of Parliament must by express words bring the offense within the substantial description made in the act of Parliament, and those circumstances mentioned in the statute to make up the offense shall not be supplied by the general conclusion "contra formam statuti." * * * If a man be indicted for an offense, which was at common law, and concludes "contra formam statuti," but in truth it is not brought by the indictment within the statute, it shall be quashed, and the party shall not be put to answer it as an offense at common law.

2 Hale, P. C. c. XXIV.

An indictment consists of three parts: The commencement, the statement, and the conclusion. * * * The commencement of every indictment is thus: "Middlesex, to wit: The jurors for our lady the queen upon their oath present that." * * * The venue in the margin should be the county in which the offense was committed; or, if the jurisdiction of the court in which the bill of indictment is to be preferred extend only to part of the county, or * * * include more than one county, or be confined within the limits of a borough, * * * the venue in the margin should be coextensive with the jurisdiction of the court. This is the general rule of the common law; but many exceptions have been made to it by statute.

Archbold's Crim. Plead. (13th Ed.) 20.

The most considerable parts of an indictment in capital offenses are: 1. The name and addition of the party offending. 2. The day and time of the offense committed. 3. The place where it was committed. 4. Upon or against whom committed. 5. The manner of the commission of it. 6. The fact itself and the nature of it. 7. The conclusion.

Regularly every indictment ought to conclude "contra pacem domini regis." [5]

If an offense be newly enacted, or made an offense of an higher nature by act of Parliament, the indictment must conclude "contra formam statuti."

2 Hale, P. C. c. XXV.

If an indictment do not conclude "contra formam statuti," and the offense indicted be only prohibited by statute, and not by common law, it is wholly insufficient, and no judgment at all can be given upon it.[6] But if the offense were also an offense at common law, I take it to be in a great measure settled at this day that judgment may be given

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not vitiate the indictment. State v. Raiford, 7 Port. (Ala.) 101 (1838). Where it is held that words must be used instead of figures, the objection to the use of figures cannot be taken after verdict. Commonwealth v. Jackson, 1 Grant Cas. (Pa.) 262 (1855).

[5] See Anderson v. State, 5 Ark. 444 (1843); Reg. v. Lane, 6 Mod. 128 (1704).

[6] State v. Soule, 20 Me. 19 (1841); People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197 (1834). Statutes in England and in some states have abolished the necessity for the conclusion. Castro v. Reg. 14 Cox, C. C. 546 (1881); State v. Dorr, 82 Me. 341, 19 Atl. 861 (1890).

as for an offense at common law, though the indictment conclude "contra formam statuti."

If there be more than one statute concerning the same offense, and the first of them was never discontinued, and the latter only continue the former without making any addition to it, or only qualify the method of proceeding upon it, without altering the substance of its purview, it seems agreed that it is safe, in an indictment upon any such statute, to conclude "contra formam statuti"; and it hath been holden that a conclusion "contra formam statutorum" will in such cases vitiate the prosecution. * * * But where a statute hath been wholly discontinued, and is afterwards revived, there seem to have been some opinions that a prosecution on it ought to conclude "contra formam statutorum."

Also where the same offense is prohibited by several independent statutes, there are some authorities that you must either conclude "contra formam statutorum," or "contra formam" of the particular statutes, naming them, and that if you barely conclude "contra formam statuti," the indictment will be insufficient, for not showing on which one of the statutes it was taken. But there are also strong authorities for the contrary opinion, which is also most agreeable to precedents.[7]

2 Hawkins, P. C. c. 25, §§ 116, 117.

EVANS v. STATE.

(Court of Criminal Appeals of Texas, 1895. 34 Tex. Cr. R. 110, 29 S. W. 266.)

HENDERSON, J.[8] * * * There ~~was a motion by~~ defendant to quash the indictment on the ground that the indictment contained the word "possion," and not "possession," which was overruled by the court, and a bill of exception saved by the defendant. The defendant also objected to the evidence regarding the taking of the clothing, on the ground that there was no proper allegation in the indictment charging that same were in the possession of Barnard. The court overruled the objection, and to this defendant reserved an exception. The defendant also reserved a bill of exception to the charge of the court on possession, on the ground that there was no sufficient allegation in the indictment to support such charge.

The sufficiency of the word "possion," as used in the indictment, instead of the word "possession," used in the statute defining robbery, is thus presented for our consideration. We have examined the dictionaries, and nowhere find such a word as "possion," nor do we find it used as an abbreviation for "possession" or any other word. It is not idem sonans with the word "possession," nor can we consider it simply as an instance of bad spelling. Evidently the pleader intended to write in the indictment the word "possession," but with us it is not a question of what he means, but what did he do; and the word "possession," in defining the offense of robbery, is material, and we cannot supply it by intendment.

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[7] See U. S. v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15,204 (1834).

[8] Part of this case is omitted.

In Jones v. State, 25 Tex. App. 621, 8 S. W. 801, 8 Am. St. Rep. 449, this court at a former term held that in an indictment for theft the word "appriate" was not equivalent to the word "appropriate" as used in the statute defining theft, and that its use vitiated the indictment. In State v. Williamson, 43 Tex. 502, referred to in the above cases, the very word "possion" used in the indictment in this case was used in the indictment in that case. The question came up in that case on a motion in arrest of judgment. The court in that case seemed to treat the word as one of form, saying, "An objection of this character should be interposed before the trial, and should not be made the ground of a motion in arrest of judgment;" and yet they say, "It cannot be doubted that the indictment must aver that the property was taken from the possession of the owner."

We do not think it can be doubted that if an indictment for theft or for robbery should fail to properly allege the possession of the property taken it is a matter of substance, and of such materiality that it can be taken advantage of by motion in arrest of judgment, as well as by a motion to quash the indictment; and the only question for us to determine is, does the use of the word "possion" accomplish this? As before stated, the word used is not idem sonans with "possession," and it is not an abbreviation of that word, and we cannot supply a proper word conveying in its meaning a material averment in an indictment. If we were to undertake to do so, we would afford a bad precedent, when, by the rigid adherence to the rule, those who draw indictments will be encouraged to use more care and diligence, and mistakes will thus be avoided. * * *

The judgment of the lower court is accordingly reversed and remanded.[9]

STATE v. COLLY.

(St. Louis Court of Appeals, Missouri, 1897. 69 Mo. App. 444.)

BLAND, P. J.[10] At the February term, 1893, of the Lawrence county circuit court, the defendant was indicted for a violation of the dram-shop law. The charge was, that he sold one bottle of "larger" beer. The case was taken to the Barry county circuit court by change of venue, and at the November, 1895, term thereof he filed his motion to quash the indictment, because the indictment charges the selling of "larger" beer (not "lager" beer). This motion was overruled. A trial was had by the court sitting as a jury. Defendant was convicted. Motions in arrest and for new trial were filed and overruled, bill of exceptions filed, and appeal taken to this court.

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[9] Accord: "Maice" for "malice." Wood v. State, 50 Ala. 144 (1873). "Larcey" for "larceny." People v. St. Clair, 56 Cal. 406 (1880). "Farther" for "father." State v. Caspary, 11 Rich. Law (S. C.) 356 (1858).

[10] Part of this case is omitted.

The fact that the pleader used one "r" too many in his spelling of the word "lager," in the absence of the fact that the use of this superfluous letter did not construct another word having a separate and different signification from the word "lager," makes it quite clear that it is a case of misspelling, which does not vitiate a pleading, civil or criminal, where, as in this case, it is apparent ~~what~~ word was intended to be used, and where the word as spelled has the same sound as the intended word, when correctly spelled. The evidence supported the finding of the court. No instructions were asked or given.

We find no error in the record, and affirm the judgment. All concur.[11]

STATE v. EDWARDS.

(Supreme Court of Missouri, 1854. 19 Mo. 674.)

RYLAND,[12] Judge, delivered the opinion of the court. * * * The omission in this indictment consists of the neglect to insert the word "did" before the words "assault, beat and maltreat one Stephen L. Page, in the peace then and there being, and other wrongs," etc., so as to make the sentence read thus: "With force and violence, in a turbulent and violent manner, 'did' assault, beat and maltreat," etc. We are inclined ~~to think that~~ this word "did" may, in this indictment, be supplied by ~~intendment.~~

In indictments for misdemeanors merely, such intendment is often resorted to. The strictness and rigor in the construction of indictments for felonies are not applied uniformly to indictments for mere misdemeanors. In the case of State v. Halder, 2 McCord (S. C.) 377, 13 Am. Dec. 738, the omission to insert the word "did" before the words "feloniously utter and publish, dispose and pass" was held fatal, and the judgment was arrested. This indictment was for a felony.

In the case of State v. Whitney, 15 Vt. 298, which was an indictment for a misdemeanor, selling liquor by the small measure, without license, the word "did" was omitted, which should have been joined with the words "sell and dispose of." This omission was held not to be fatal on motion in arrest of judgment. Bennett, J., in delivering the opinion of the court, said: "In this indictment, it is alleged that the respondent, on the first day of August, A. D. 1842, at, etc., sell and dispose of, etc. It is evident the omission is purely a clerical one. The auxiliary verb may be supplied by intendment."

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[11] Accord: "Eiget" for "eight." Somerville v. State, 6 Tex. App. 433 (1879). "Mair" for "mare," State v. Myers, 85 Tenn. 203, 5 S. W. 377 (1886). "Assatt" for "assault." State v. Crane, 4 Wis. 400 (1854). "Janury" for "January." Hutto v. State, 7 Tex. App. 44 (1879). "Rill" for "kill." Irvin v. State, 7 Tex. App. 109 (1879). "Frausulently" for "fraudulently." St Louis v. State (Tex. Cr. App.) 59 S. W. 889 (1900). "Gol" for "gold." Grant v. State, 55 Ala. 201 (1876).

[12] Part of this case is omitted.

There was no necessity to supply this auxiliary verb "did" before one of the verbs used in this sentence above quoted, viz., the verb "beat." Leaving out the words "assault and maltreat," and using the verb "beat" alone, and the charge is positive and direct. The words in the beginning of this sentence, "with intent," may be rejected as surplusage. They do not injure the indictment, being no part of the description of the offense, and may be stricken out, leaving the offense full and complete. But it is very clear that the words "assault, beat and maltreat" express all the action which is imputed to the defendant, and no one can misapprehend their sense in the connection in which they are used, and the helping verb will at once be supplied by intendment. In the case of King v. Stevens & Agnew, 5 East, 260, Lord Ellenborough said: "If the sense be clear, nice exceptions ought not to be regarded." In respect of this, Lord Hale says (2 Hale, P. C. 193): "More offenders escape by the over-easy ear given to exceptions in indictments than by their own innocence, and many heinous and crying offenses escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villainy, and the dishonor of God."

Upon the whole, it is the opinion of this court that the judgment below be affirmed; and, the other judges concurring, it is affirmed accordingly.[13]

STATE v. GILBERT.

(Supreme Court of Vermont, 1841. 13 Vt. 647.)

REDFIELD, J.[14] The objection to the use of the words Anno Domini, in the caption of the indictment, cannot prevail. The abbreviations A. D., standing for these same words, were considered sufficient in an indictment. State v. Hodgeden, 3 Vt. 481. A fortiori, the words themselves should be. These words have become literally English by adoption. The same is true of a very considerable number of terms in the language. Most of these adopted terms have changed their costume, while others have not. "Phenomenon" and "memorandum" are as strictly English as any terms of the most purely Saxon derivation. Others are not the less so because they still retain their foreign dress;

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[13] See, also, State v. Raymond, 20 Iowa, 582 (1866); State v. Whitney, 15 Vt. 298 (1843); Ward v. State, 8 Blackf. (Ind.) 101 (1846).

[14] Part of this case is omitted.

e. g., pro tempore, sine die, nemine contradicente, bona fide, Anno Domini, as well as ennui, sang froid, beaux, cap-a-pie, tête-a-tête, and thousands of others, which are well understood by mere English readers. * * *[15]

REX v. WHITEHEAD.

(Court of King's Bench, 1693. 1 Salk. 371.)

Mr. Northey moved to quash two indictments, which were quod cum an order was made that the parishioners should receive a bastard child; they in contempt did refuse to receive it. And because it was not positively said, that it was ordered that they should receive it, but only by recital with ~~a quod~~ cum, they were quashed.[16]

BURROUGH'S CASE.

(Court of King's Bench, 1676. 1 Vent. 305.)

He and others were indicted, for that they being churchwardens, overseers of the poor, and he a constable, did contemptuously and voluntarily neglect to execute diversa præcepta et warranta, directed to them by the bailiffs of Ipswich (being justices of the peace) under their hands and seals, etc. It was moved ~~to~~ quash it, for that the nature and tenor of the warrants were not expressed in the indictment; for unless the parties ~~know particularly what they~~ are charged with, they cannot tell how to ~~make their~~ defense.

And for that reason it was quashed by the court.

REX v. ROBE.

(Court of King's Bench, 1735. 2 Strange, 999.)

An information was filed ~~against him for~~ several illegal exactions in his office of clerk of the market, and there were several counts specifying sums taken of particular persons, upon all which distinct charges the defendant was acquitted; but at the close of the information there was a general charge, of which he was found guilty, viz., that under color of his said office he did illegally cause his agents to demand and receive of several other persons several other sums of money, on pretense of weighing and examining their several weights and measures. Exception was taken, that this is so general a charge, that it is impossible ~~any man can prepare~~ to defend himself on this prosecution, or have the benefit of pleading it in bar to any other; and for this fault the judgment was arrested.

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[15] See, also, State v. Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305 (1844). Cf. State v. Mitchell, 25 Mo. 420 (1857).

[16] Cf. Rex v. Ryland, L. R. 1 C. C. 99 (1867); Rex v. Lawley, 2 Str. 904 (1730).

III. The Conclusion

REX v. CLERK.

(Court of King's Bench, 1695. 1 Salk. 370.)

Indictment that twenty persons being assembled, the defendant, not being licensed, preached ~~to them, not concluding~~ contra formam statuti, was quashed, for they might be the defendant's own family, to which the statute does not extend, and it is not an offense at common law. But Dolben differed in this.

ANONYMOUS.

(Court of King's Bench, 1649. Style, 186.)

The court was moved to quash an indictment against a baker for selling of bread under the assize. The exceptions were: 1. That it doth not say what assize, whereas there be divers assizes of bread.

* * *

Roll, Chief Justice, said to the first exception, it is good enough to say he sold the bread contra assisam, although it say not what assize.[17]

ANONYMOUS.

(Upper Bench, 1655. Style, 449.)

The court was moved to quash an indictment against one Peers, for speaking provoking language to one, contrary to the late ordinance of the Lord Protector and his council, upon these exceptions: * * * 2dly. It is said by an ordinance of the Protector, made such a day, and doth not say in that case provided. And upon these exceptions it was quashed.[17]

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[17] Part of this case is omitted.

ANONYMOUS.

(Court of King's Bench, 1662. 1 Vent. 108.)

An indictment for not performing an order of the justices of the peace concerning a bastard child. It was moved to quash it because it did not conclude contra pacem. But it was held that ought not to be it being but for a non feasans.[19]

IV. Duplicity

SMITH et al. v. STATE.

(Supreme Court of Nebraska, 1891. 32 Neb. 105, 48 N. W. 823.)

Norval, J.[20] On the 6th day of May, 1889, the county attorney filed in the district court of Lancaster county an information charging "that Moses Smith and W. Kief, late of the county aforesaid, on the 1st day of February, A. D. 1889, in the county of Lancaster and state of Nebraska, aforesaid, did unlawfully sell, give away, and vend spirituous, vinous, and intoxicating liquors to Orin Snyder, Frank Martin and P. H. Cooper, and to other persons to the county attorney unknown, without having first complied with the provisions of the Compiled Statutes of the state of Nebraska, and without first having taken out a license to sell, give away, and vend spirituous, vinous, and intoxicating liquors; the said above sales of spirituous, vinous, and intoxicating liquors by said Moses Smith and W. Kief, as aforesaid, being without authority, and contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the state of Nebraska." The defendants moved the court to quash the information. * * *

The motion to quash the information should have been sustained. The information is too indefinite and uncertain. It contains but one count, and charges that the defendants sold and gave away spirituous, vinous, and intoxicating liquors. It was held in State v. Pischel, 16 Neb. 490, 20 N. W. 848, that the act of selling any of the liquors named in section 11 of chapter 50 of the Compiled Statutes, as well as the act of giving away any of them, without a license so to do, is a crime. We adhere to the rule therein announced. This case is not distinguishable from State v. Pischel. As the judgment must be reversed for the error pointed out, it will not be necessary to notice the other assignments of error.

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[19] In lieu of these technical words, the following forms have been held sufficient: "Contrary to law." Hudson v. State, 1 Blackf. (Ind.) 317 (1824). [But see Commonwealth v. Stockbridge, 11 Mass. 279 (1814).] "Contrary to the true intent and meaning of the act of Congress of the United States, in such case made and provided." U. S. v. Smith, 2 Mason. 143, Fed. Cas. No. 16,338 (1820). Contra: "In contempt of the laws of the United States of America." U. S. v. Andrews, 2 Paine, 451, Fed. Cas. No. 14,455 (1832).

[20] Part of this case is omitted.

The judgment is reversed, and the cause remanded for further proceedings. The other judges concur.

STATE v. NEWTON.

(Supreme Court of Vermont, 1870. 42 Vt. 537.)

This was an indictment for the larceny of a coat, one bracelet, two ear-rings and a breast pin. * * *

To this indictment the respondent demurred generally and specifically, assigning as cause of special demurrer that in said indictment, containing but a single count, the respondent was charged with the commission of two separate and distinct felonies.[21]

STEEL, J. It is urged that the indictment is open to the objection of duplicity, because in a single count it charges the larceny of several articles, some of which were owned by one person and some by another.

Whether the count is double depends on whether it charges more than one larceny. ~~Whether there~~ was more than one larceny depends on whether there was more than one taking and not on the number of articles taken, nor on their ownership. The count alleges but one taking, a single transaction, and is therefore not double. The articles are alleged to have been found and taken at one time and at one place. The indictment follows the form in Chit. Cr. Law, 959. The authorities upon this subject are ably reviewed by Mr. Justice Sargent in State v. Merrill, 44 N. H. 625, and we concur in the doctrine of that case. See, also, State v. Cameron, 40 Vt. 555. We see no fault in the indictment, either in its description of the place where the offense occurred, or in the form of its conclusion. The result is a judgment that the respondent take nothing by his exceptions.[22]

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[21] Part of this case is omitted.

[22] Accord: State v. Stevens, 62 Me. 284 (1874).

See, for use of the disjunctive in the statement of an offense, People v. Hood, 6 Cal. 236 (1856); Sims v. State, 135 Ala. 61, 33 South. 162 (1902).

If the disjunctive can be construed to mean "to wit" (see State v. Gilbert, 13 Vt. 647 [1841]), or if the disjunctive and what follows can be rejected as surplusage (State v. Corrigan, 24 Conn. 286 [1855]), the disjunctive allegation will not render the indictment bad.

COMMONWEALTH v. TWITCHELL.

(Supreme Judicial Court of Massachusetts, Hampshire, Franklin and Hampden, 1849. 4 Cush. 74.)

METCALF, J.[23] 1. It is unnecessary to inquire, in this case, whether duplicity in an indictment is a cause for arresting judgment; because we are of opinion that the allegation, in this indictment, that the defendant "did set up and promote" an exhibition, does not make the indictment objectionable for duplicity, but charges only one offense. In Commonwealth v. Eaton, 15 Pick. 273, an indictment, which alleged that the defendant "did unlawfully offer for sale, and did unlawfully sell," a lottery ticket, was held good, on demurrer; and we cannot distinguish that case from this. So an indictment, which avers that the defendant "did write and publish, and cause to be written and published," a malicious libel, is not bad for duplicity. 2 Gabbett, Crim. Law, 234; 3 Chit. Crim. Law (4th Am. Ed.) 877, et seq. * * *

Exceptions overruled.[24]

SPROUSE v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia, 1886. 81 Va. 374.)

LACY, J., delivered the opinion of the court.[25] * * *

The first assignment of error here is to the ruling of the county court in refusing to quash the indictment. That the said indictment is double and presents a case of duplicity in pleading; that the forgery of the check was one offense, and the forgery of the indorsement was another offense, and that two distinct offenses were contained in the same count; that the forgery of the check alone was an indictable offense—citing Perkins' Case, 7 Grat. 651, 56 Am. Dec. 123; that the forgery of the indorsement was an indictable offense—citing Powell's Case, 11 Grat. 822; and that the said second count is liable to the same objection, and is equally defective.

Duplicity, or double pleading, consists in alleging, for one single purpose or object, two or more distinct grounds of complaint, when one of them would be as effectual in law as both, or all. This is a fault in all pleading, because it produces useless prolixity, and tends to confusion, and to the multiplication of issues. This, however, is only a fault in form. The criminal law does not permit the joinder of two or more offenses in one count.

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[23] Part of this case is omitted.

[24] See, also, Wein v. State, 14 Mo. 125 (1851); Wessels v. Kansas, McCahon (Kan.) 100 (1860); Cobb v. State, 45 Ga. 11 (1872).

"When one count in an indictment charges two offenses, distinct in kind and requiring distinct punishments, the objection of duplicity has been allowed in arrest of judgment. Commonwealth v. Symonds, 2 Mass. 163; State v. Nelson, 8 N. H. 163; People v. Wright, 9 Wend. (N. Y.) 193. But when the two offenses are precisely alike, the only reason against joining them in one count is that it subjects the accused to confusion and embarrassment in his defense. The objection is not open after a verdict of guilty of one offense only, but must be taken by motion to quash, or to compel the prosecutor to confine himself to one of the charges." Gray, C. J., in Commonwealth v. Holmes, 119 Mass. 195 (1875).

[25] Part of this case is omitted.

We must consider what are two or more distinct offenses within the rule just stated. It is not an objection to an indictment that a part of the allegations might be lopped off and the indictment remain sufficient; and, although the charge might be branched out into two offenses, if the whole be but parts of one fact of endeavor, all the parts may be stated together. Of this there are familiar illustrations. An accused might be charged with selling the different kinds of liquor contrary to law. The sale of each kind would be an indictable offense, yet an indictment setting forth a violation of the law in selling all could not be said to charge several distinct offenses. A man may be indicted for the battery of two or more persons in the same count, yet the battery of each was an offense; yet they may be charged together, because they are but parts of one endeavor—the offense against the commonwealth being the breach of the peace. Or a libel upon two or more persons, when the publication is one single act, may be charged in one count without rendering it bad for duplicity under the rule stated above. Or in robbery, with having assaulted two persons, and stolen from one one sum of money, and from the other a different sum, if it was all one transaction. Or where two make an assault, with an intent to kill, with different weapons, they may be charged jointly in one count. And if a man shoots at two persons to kill either, regardless of which, he may be convicted on a charge of a joint assault, yet either assault was an offense.

And, as was asked by an English judge: "Cannot the king call a man to account for a breach of the peace because he broke two heads instead of one? How many informations have been for libels upon the king and his ministers?" Rex v. Benfield, 2 Burrows, 980.

In Barnes v. State, 20 Conn. 232, Waite, J., said upon this question: "No matters, however multifarious, will operate to make a declaration or information double, provided that all taken together constitute but one connected charge or one transaction." And Mr. Bishop says this observation may be accepted as expressing the common doctrine, when we add to it the words: "Provided, also, that in any view which the law could take of the one transaction, it may be regarded as constituting but one offense"—citing the case of Francisco v. State, 24 N. J. Law, 30–32, where it was held that a conviction on an indictment charging assault, battery and false imprisonment was not bad for duplicity, because, as was said by Potts, Judge: "The assault, the battery, the false imprisonment, though in themselves, separately considered, they are distinct offenses, yet, collectively, they constitute but one offense."

Multiplication of authority, or of argument, cannot be necessary on this point, and we will conclude this question with a remark of Baron Parke, who said to counsel: "Your objection would apply to every case of a burglary and a larceny. There would be, first, the burglary; secondly, the larceny; thirdly, the compound or simple larceny; fourthly, the stealing in a dwelling house." When Tindal, Chief Justice, added: "This is one set of faults. It is all one transaction. The prisoner could not have been embarrassed." Rex v. Bowen, 1 Denison's Crown Cases, 22; Archbold Crim. Pl. (13th London Ed.) p. 54.

In this case the prisoner was charged with forging a check payable to Gibson, and then forging Gibson's name on the back. This appears to be one transaction, a forgery, looking to the prejudice of another's right, a single fact of one endeavor; and, as was said by Tindal, C. J., supra: "This is one set of facts. It is all one transaction. The prisoner could not have been embarrassed." We think there was no defect in the indictment, and the motion to quash was properly overruled. * * *

Judgment affirmed.[26]

COMMONWEALTH v. FULLER.

(Supreme Judicial Court of Massachusetts, Norfolk, 1895. 163 Mass. 499, 40 N. E. 764.)

FIELD, C. J.[27] This is an indictment containing but one count, charging that the defendant, "on the 1st day of July, in the year of our Lord one thousand eight hundred and ninety-four, at Medfield, in the county of Norfolk, aforesaid, and on divers other days and times between that day and the 5th day of June, in the year of our Lord, 1894, did commit the crime of adultery with one Marion Brown, by then and there having carnal knowledge of the body of the said Marion Brown, the said Calvin Fuller being then and there a married man, and then and there having a lawful wife alive other than the said Marion Brown, and the said Calvin Fuller and Marion Brown not being then and there lawfully married to each other." The defendant duly filed a motion to quash the indictment, for these reasons: "(1) Because the said indictment does not set forth any offense known to the law in any legal or sufficient manner; (2) because the said indictment is bad for duplicity in charging more than one offense in the same count."

We think that the indictment should be quashed for each of the reasons alleged. Adultery is not a continuing offense. Each act of adultery constitutes a separate offense. This is not a case where the continuance can be rejected as surplusage on the ground that the form of the allegation is imperfect and insufficient, because here the allegation is sufficient in form. If it is permissible to charge adultery with a continuando, then the commonwealth should have been limited in its proof of substantive acts to the time alleged, and the commonwealth ultimately relied upon acts which occurred more than a year before any time alleged. The real difficulty in the present case is that the defendant is charged in one count with the commission of many acts of adultery with the same person on different days and times. Com. v. Adams, 1 Gray, 481; State v. Temple, 38 Vt. 37. * * *

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[26] Compare Reed v. State, 88 Ala. 36, 6 South. 840 (1889).

[27] Part of this case is omitted.

Exceptions sustained.

V. REPUGNANCY

HUME v. OGLE.

(Court of Queen's Bench, 1590. Cro. Eliz. 196.)

Appeal of the death of her husband. And declares, that the defendant, such a day, at West Lilburne in the said county, gave him a mortal wound, of which, at Wetwood in the said county, he languished, and the same day there died; and so the said defendant, the same day and year, at West Lilburne aforesaid, her said husband modo et forma prædict' murdravit. And although not guilty pleaded, and issue joined upon it, yet he waived it, and demurred upon the declaration (as it was clearly held by THE COURT he might). For if the declaration be not good, it is in vain to proceed to a trial; yet it was clearly held, that it is not peremptory to the defendant; for if it be adjudged against him, it is but a respondeat ouster. And the cause of the demurrer was, that the death is supposed to be at Wetwood, and yet the murder is supposed to be at West Lilburne, which is contrary, and cannot be; for although the stroke is supposed to be at West Lilburne, yet it is not felony till his death, which was at Wetwood, and there the murder is supposed to be done; and the Case of Heyden, 4 Co. 41, was cited. And as the indictment there was insufficient for the time, so here for the place, which is more material; for from this the venire shall come: but if it had been, et sic murdravit modo et forma prædicta, it had been good. And Ive said, divers of the ancient precedents are, that the murder is supposed to be where the stroke was.—But THE JUSTICES held clearly, that the indictment was ill; for of necessity it must be at the place of his death. And although the precedents are so, yet they did pass sub silentio, and were not well examined, and not to be regarded, as Heyden's Case; and it was resolved, that there was no difference between the cases; and adjudged, that the appeal did abate.

STATE v. SALES.

(Supreme Court of Louisiana, 1878. 30 La. Ann. 916.)

EGAN, J.[28] George Sales was indicted for the murder of one Taylor. In the same indictment it was also charged "that one Dan Proffit, one William Sales, and one Edward Ryan, with force and arms, did feloniously, willfully, and of their malice aforethought [did] assist and abet the said George Sales in the killing and murdering the said William Taylor aforesaid," etc. "Therefore [the grand jury] do find and present the said Dan Proffitt, William Sales, and Edward Ryan, as aforesaid, being accessory before the fact of the killing and murdering the aforesaid William Taylor." * * *

As to the second ground of the motion in arrest, we think the objection to the indictment fatal. The accused Proffitt was evidently intended to be indicted as accessory before the fact, but the statement in the indictment that he did with force and arms willfully and feloniously and with malice aforethought "assist and abet" the killing and murdering is wholly inconsistent with the charge of being accessory either before or after the fact, and one so charged cannot be indicted as accessory. State v. White, 7 La. Ann. 531; Chitty's Crim. Law, 262, 269; State v. Maxent, 10 La. Ann. 743. An accessory before the fact is one who, being absent at the ~~time~~ of the commission of the crime (and of course being ~~unable to~~ "assist and abet" in its commission), doth yet procure, ~~counsel, or~~ command its commission. 1 Hale's Pleas of the Crown, p. 616.

The indictment is therefore bad for this reason, and as it attempts to charge the accused as accessory before the fact in terms ~~it is~~ also bad as an indictment against Proffitt as a principal offender, as he could not be both absent and present at the same time, and without being present could not be a principal in the murder. Besides, the indictment contains but one count, and even if both crimes were consistent and otherwise properly charged, it would be bad for that reason also.

The motion in arrest of judgment must prevail. * * * [29]

STATE v. LOCKWOOD.

(Supreme Court of Missouri, Division No. 2, 1894. 119 Mo. 463, 24 S. W. 1015.)

BURGESS, J.[30] At the September term, 1893, of the circuit court of Henry county, an indictment was returned by the grand jury of said county against the defendant, which, omitting the formal parts, is as follows:

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[28] Part of this case is omitted.

[29] See, also, Jones v. State, 63 Ala. 27 (1879).

[30] Part of this case is omitted.

"That Albert Lockwood, on the 31st day of July, 1892, at the county of Henry, and state of Missouri, in and upon one Robert McAllister, then and there being, feloniously, willfully, and with culpable negligence did make an assault, and with a dangerous and deadly weapon, to wit, a pistol, then and there loaded with gunpowder and leaden balls, which he, the said Albert Lockwood, then and there in his right hand had and held at and against him, the said Robert McAllister, did then and there feloniously and willfully and with culpable negligence, shoot off and discharge, and with the pistol aforesaid, and the leaden balls aforesaid, then and there feloniously, willfully, and with culpable negligence did shoot and strike him, the said Robert McAllister, in and upon the front part of the head, and just above the left eye, of him, the said Robert McAllister, giving him, the said Robert McAllister, then and there, with the dangerous and deadly weapon, to wit, the pistol aforesaid, and the gunpowder and leaden balls aforesaid, in and upon the front part of the head, and just above the left eye, of him, the said Robert McAllister, one mortal wound of the breadth of one inch and of the depth of four inches, of which said mortal wound the said Robert McAllister then and there, on the said 31st day of July, 1892, at the county aforesaid, died; and so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Albert Lockwood, him, the said Robert McAllister, in the manner and by the means aforesaid, willfully and with culpable negligence did kill and murder, against the peace and dignity of the state." * * *

If the killing was "willful," as charged in the indictment, then it could not have been accidental, or by "culpable negligence." The terms are inconsistent, as they cannot both be true. If the killing was by "culpable negligence," then it was not "intentional." The word "willful" has as much significance as have the words "culpable negligence," and we have the same right to say the latter are mere surplusage as we have the right to say the word "willful" is. The indictment we think insufficient in law, and the court did not err in sustaining the motion to quash it. Judgment affirmed. All concur.

STATE v. DANDY.

(Constitutional Court of South Carolina, 1804. 1 Brev. 395.)

This was an indictment for a misdemeanor, charged to have been committed by the defendant in compounding a felony, and was tried before Trezevant, J. The felony stated in the indictment was for passing a counterfeit bank bill, which was charged to have been committed on the 5th day of November, 1802. The indictment then stated that "afterwards, to ~~wit, on~~ the 1st day of June, 1800," the said felony was compounded. The prisoner was found guilty; and now a motion was brought forward in this court in arrest of judgment.

Per Curiam. The indictment is absurd. It is impossible that the defendant could be guilty of the offense as charged.

Judgment arrested.

STATE v. McKENNAN.

(Constitutional Court of South Carolina, 1824. Harp. 302.)

The opinion of the court was delivered by Mr. Justice Richardson.[31]

The motion in arrest of judgment is founded upon a supposed inconsistency appearing on the face of the indictment, in stating that the defendant, in July, 1823, swore that he saw the crime committed on the 10th October in the same year, which is inconsistent and impossible, because 10th October, 1823, had not occurred at the time of the oath taken. No rule in pleading is clearer or more rational than that the indictment should set forth the facts and circumstances necessary to constitute the supposed crime, without inconsistency or repugnancy. For instance, to state that the crime had been committed upon a day yet to come would be repugnant, and render the count void. But this cannot be said of the indictment before us, for it does not state that the defendant, ~~swearing in July, 1823, committed the supposed~~ perjury upon 10th October, but that defendant committed the perjury in July, by swearing that Reed had done a certain act on 10th October. For the purpose of considering the question of arrest, we must take the facts as set forth, and if the defendant did swear that Reed committed the act in October, 1823, however inconsistent the evidence may have been, yet the indictment cannot be incorrect in setting it forth precisely as delivered in court from the mouth of defendant. On the contrary, as a general rule, the greater the departure from such a course, the greater the danger of incorrectness; for though a general count of the words delivered may not be bad, yet an exact detail, even when superfluous, must be better. In a word, to describe the act charged just as it happened cannot be wrong; and if the act consists of supposed false words spoken on oath, the same rule applies, and with the same force, the end in view being a correct representation of the fact. The argument used cannot prevail. * * *[32]

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[31] Part of this case is omitted.

[32] Where the repugnant averments are not material, and the indictment is otherwise good without them, they may be rejected as surplusage. See 1 Chit. Cr. Law, 173.

"No indictment * * * shall be deemed invalid * * * for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged. * * *" Rev. St. Mo. § 1821. See State v. Chamberlain, 89 Mo. 129, 1 S. W. 145 (1886).

VI. SURPLUSAGE

REX v. MORRIS.

(Court of King's Bench, 1774. 1 Leach, 109.)

Robert Edwards was tried before Mr. Justice Ashhurst, at the Old Bailey, in September session, 1774, for robbing Thomas Morgan on the highway of a gold watch, chain, and seals; and the same indictment charged "that Francis Morris the goods and chattels above mentioned, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have; he the said Thomas Morris, then and there, well knowing the said goods and chattels last mentioned to have been feloniously stolen, taken, and carried away."

The prisoners were found guilty; but it was moved in arrest of judgment that, the indictment having alleged that Francis Morris had received the property, and that Thomas Morris knew it to have been stolen, the conviction could not be supported as against the accessory, for that the fact of receiving and the knowledge of the previous felony must reside in the same person; whereas the indictment charged them in two different persons, one of the name of Francis, and the other of the name of Thomas.

The point was reserved for the opinion of THE TWELVE JUDGES, upon the following question: Whether the words "the said Thomas Morris," could be rejected as surplusage? and they were unanimous that, as the indictment would be sensible and good without these words, they might be struck out as superabundant and unnecessary.

FULFORD v. STATE.

(Supreme Court of Georgia, 1874. 50 Ga. 591.)

TRIPPE, J.[33] The indictment in this case not only charged the defendant, as principal in the second degree, in being present, aiding and abetting the chief perpetrator of the alleged offense, but proceeded

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[33] The statement of facts is omitted.

"The indictment is sufficient under the criminal procedure act, and the motion to quash was rightfully refused. It does not furnish sufficient information to enable the defendant to prepare his defense, and this may often occur where the law declares an indictment good, 'which charges the crime substantially in the language of the act of assembly prohibiting the crime, and prescribing the punishment, if any such there be, or, if at common law, so plainly that the nature of the offense may be easily understood by the jury.' Prior to 1860, when greater particularity was required in setting out the offense in the indictment, it sometimes failed to give the defendant such notice as he was entitled to, of the specific matters which would be attempted to be proved against him on the trial. Whenever such is the case, the accused may apply to the court or judge for an order that a bill of particulars be filed, and on the trial the commonwealth will be restricted to the proof of the items further and specified the acts whereby the aiding and abetting were done. The prosecuting counsel, on motion, struck these descriptive averments from the indictment, over the objection of defendant.

We recognize the rule that it is not necessary to prove allegations in an indictment which are immaterial or purely surplusage. But the question is, what are immaterial averments? Or, rather, when do averments which might have been omitted become material—or, at least, so enter into the indictment as framed that they cannot be stricken or rejected as surplusage? Starkie on Evidence, vol. 3, p. 1539, says it is a most general rule that no allegation, which is descriptive of the identity of that which is legally essential to the claim or charge, can ever be rejected; and on page 1542, same volume, makes it more specific by restating the rule thus: "The position that descriptive averments cannot be rejected extends to all allegations which operate by way of description or limitation of that which is material." Bishop says: "If the indictment sets out the offense as done in a particular way, the proof must show it so, or there will be a variance. And where there is a necessary allegation which cannot be rejected, yet the pleader makes it unnecessarily minute in the way of description, the proof must satisfy the description as well as the main part, since the one is essential to the identity of the other." 1 Bishop's C. P. §§ 234, 235. If the prosecutor state the offense with unnecessary particularity, he will be bound by that statement, and must prove it as laid. United States v. Brown, 3 McLean, 233, Fed. Cas. No. 14,666; Rex v. Dawlin, 5 T. R. 311.

In the case in 3 McLean, the indictment charged the postmaster with stealing a letter containing certain bank notes. It was held that the averment as to the bank notes might have been omitted, and an offense was charged without those words; but, being in, they must be proved. So in United States v. Porter, 3 Day, 283, Fed. Cas. No. 16,074, the charge was stopping the mail, with an averment of a contract between the Postmaster General and the carrier. Though this averment was not necessary to the indictment, it was adjudged that it must be proved. In State v. Copp, 15 N. H. 212, the defendant was

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contained therein. Rex v. Hodgson, 3 C. & P. 422; Rex v. Bootyman, 5 C. & P. 300; Commonwealth v. Snelling, 15 Pick. (Mass.) 321. Doubtless had the defendant made application, a bill of particulars would have been ordered. In simplifying indictments, it was not the intendment to make their brief and comprehensive terms a cover for snares to be sprung on the accused. Whether a refusal to order the bill would be a subject of review is a question not now raised." Trunkey, J., in Williams v. Commonwealth, 91 Pa. 502 (1879).

"The application [for a bill of particulars] is one addressed to the discretion of the court, and its action thereon is not subject to review." Brown, J., in Dunlop v. United States, 165 U. S. 491, 17 Sup. Ct. 376, 41 L. Ed. 799 (1896).

"He who has furnished a bill of particulars * * * must be confined to the particulars he has specified, as closely and effectually as if they constituted essential allegations in a special declaration." Merrick, J., in Commonwealth v. Giles, 1 Gray (Mass.) 469 (1854).

indicted for resisting the sheriff legally appointed and duly qualified. Although the appointment and qualification might have been omitted, it was held that it was necessary to establish them by testimony. Where the statute made it penal to sell spirituous "or" intoxicating liquors, and the charge was the selling of spirituous "and" intoxicating liquors, the prose~~cutor was~~ bound to show the liquor to be both spi~~rituous and intoxica~~ting. Commonwealth v. Eagan, 4 Gray (Mass.) 18. See Commonwealth v. Varny, 10 Cush. (Mass.) 402; Commonwealth v. Butcher, 4 Grat. (Va.) 544; United States v. Keen, 1 McLean, 429, Fed. Cas. No. 15,510.

These decisions agree with the rule as quoted from Bishop and Starkie. The confusion that grows out of applying it may be avoided by observing the qualification of it, or rather the statement of another rule given by Bishop, Chitty, and Phillips. Chitty (1 Criminal Law, 294, 295), says: "If any unnecessary averments, disconnected with the circumstances which~~ constitute the~~ stated crime, be introduced, they need not be proved, but may be rejected as surplusage." See, also, 1 Chancery Pleadings, 263. Bishop and Phillips state this rule to be, if the entire averment may be omitted of which the descriptive matter is a part, or can be rejected as surplusage, then the descriptive matter falls with it and need not be proved. Phillips' Evidence (8th Ed.) 854; 1 Bishop, Criminal Proceedings, § 235. Or, as it is put in 3 McLean, supra, if the averment be mere facts disconnected with the offense, they need not be proved. See, also, on this distinction in the rule, State v. Copp, 15 N. H. 212.

These authorities show the line between material and immaterial averments, and where those which might have been omitted, when once introduced, become an important part of the indictment, and cannot be rejected as surplusage or stricken out, but must be proved. And there is reason and justice in the distinction. Take this case. It was not necessary that the pleader should have stated the acts of the defendant which constituted his "aiding and abetting," or to define how it was done. The "aiding and abetting" was an essential averment. The defendant was charged with so doing "by pushing, striking, assaulting and threatening the said J. A. Conway." He was put on notice that it would be proved on him that he did these things. He proposes to meet the charge, and to show that he did not push, strike, assault or threaten the said Conway. The aiding and abetting may be made out by proving many other ways in which it may be done, totally foreign to those set forth in the indictment. The prosecution, knowing this, proposes to strike out all these descriptive averments and leave an open field for any and all proof of any and all forms or ways in which the aiding and abetting may be shown. This would be permitting a defendant to be called upon to meet a charge specifically made in one form and then to allow him to be convicted by a change of the indictment on proof of acts totally distinct from those of which he was notified. It is hard enough that a defendant may be convicted on a general averment of "aiding and abetting," without subjecting him, after specific acts are charged, to the hazard of having them stricken after he may have prepared to meet them as made, and to a conviction for acts of any kind that the prosecution may see fit to produce. We do not think it can be done on principle or authority.

Judgment reversed.

CHAPTER X

THE INDICTMENT—CONTINUED

SECTION 1.—PARTICULAR AVERMENTS

I. AVERMENT OF FACTS AND CIRCUMSTANCES NECCESSARY TO CONSTITUTE THE OFFENSE

TATE'S CASE.

(Newcastle Summer Assizes, 1833. 1 Lew. 234.)

Prisoners were convicted of stealing five hens. The indictment contained no averment that they were tame.

Losh, for the prisoners, took the objection, and BOLLAND, B., arrested the judgment.

REX v. STRIDE.

(High Court of Justice, King's Bench Division [1908] 1 K. B. 617.)

Lord ALVERSTONE, C. J.[1] This case raises a question of very great interest and importance with respect to the averments which it is necessary that an indictment should contain. Two persons were indicted, one a keeper named Stride, for stealing, and the other a man named Millard, for receiving a quantity of pheasants' eggs, and the main point which has to be decided is whether the indictment sufficiently avers that the eggs were the subject of larceny. * * *

We now come to the main objection, which was taken to both counts of the indictment. It was contended that they are bad in that they do not allege that the pheasants' eggs in question had been reduced into the possession of Sir Walter Gilbey at the time of the stealing. It was not, indeed, disputed by counsel for the defendants that if a keeper is employed by his master to collect, either himself or by the underkeepers, the wild pheasants' eggs, and does collect them and have them in possession on behalf of his master, those eggs, if subsequently stolen, would be the subject of larceny; but it is said that the indictment ought to contain some expression to show that they had been collected from the wild pheasants' nests.

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[1] Part of this case is omitted.

The question is whether the indictment as it stands is sufficient. The indictment charges that Stride "one thousand pheasants' eggs of the goods and chattels of and of and belonging to Sir Walter Gilbey feloniously did steal." Now I ask myself whether that averment does not, when read fairly, involve the necessity of those eggs having been already collected. In the first place, having regard to the large quantity of eggs alleged to have been stolen, no one reading the indictment could possibly think that the charge related to the taking of the eggs when in the nest; and, in the second place, in addition to the ordinary formal words "of the goods and chattels of," we find the words "and of and belonging to." It was said that the latter words were surplusage, as being merely another way of saying the same thing over again. But I do not take that view. I think that the words "and of and belonging to" may fairly mean that the eggs "had been collected by or on behalf of." Looking at the indictment as a whole, I should, apart from authority, be prepared to hold that it sufficiently charges that the eggs had been reduced into possession to satisfy the strictest rule of criminal pleading.

It has been argued that there are authorities to the contrary. The principal of these was Rough's Case, 2 East, P. C. 607, the correctness of the report of which I have been able to verify by reference to the original MS. of Buller, J., from which the report is taken. The prisoner there was convicted of stealing "a pheasant, value 40s., of the goods and chattels of H. S." There were no additional words in the indictment there. The judges were all agreed, "after much debate and difference of opinion," that the conviction was bad on the ground that "in cases of larceny of animals feræ naturæ the indictment must show that they were either dead, tame, or confined; otherwise they must be presumed to be in their original state; and that it is not sufficient to add 'of the goods and chattels' of such an one." But that case does not appear to me to be an authority in favor of the present defendants. For there was no suggestion on the face of the indictment that the pheasant was other than a wild pheasant. It contained no statement that it was "of and belonging to H. S.," or any other words to suggest that it had in fact been reduced into possession.

It seems to me that when you get a state of facts on the face of the indictment, as in the present case, which is only consistent with the articles, which are alleged to have been stolen, having been reduced into possession, it would be extremely artificial to say that that natural inference must be rejected because the articles under certain other circumstances might not be the subject of larceny. I think that if we were to take any other view of the present indictment than that which we do our decision would more properly "belong to a time when," as Lord Russell of Killowen observed in Reg. v. Jameson, [1896] 2

Q. B. 425, "the right and justice and substance of the thing were sacrificed to the science of artificial statement."

But it was said that the principle of Rough's Case, supra, was recognized in Reg. v. Cox, 1 C. & K. 494, where an indictment for stealing "three eggs" was held by Tindal, C. J., to be bad for not alleging that they were eggs of a kind that might be the subject of larceny. Speaking for myself, I am bound to say that, if at the present day a person were indicted for stealing eggs, I should be very slow to say that the indictment was insufficient because the eggs might conceivably have been "adders' eggs or some other species of eggs which cannot be the subject of larceny." Whatever one may think of the decision in that case, one cannot approve of the reason.

The next case that was referred to was Reg. v. Gallears, 1 Den. 501. There the indictment charged the stealing of "one ham, of the value of 10s., of the goods and chattels of one G. H." It suggested that, because a ham might be the ham of a wild animal, the indictment was bad. Patteson, J., said: "I do not understand the objection. Supposing it turned out on proof to be the ham of a wild boar, why should the prisoner be at liberty to take it from the prosecutor without becoming criminally liable? The doctrine respecting the description of animals in an indictment applies only to live animals, not to parts of the carcasses of animals when dead, such as a boar's head." That illustrates the principle which I have endeavored to point out applies to the indictment in the present case, namely, that things which are prima facie not the subject of larceny by reason of their being feræ naturæ are taken out of that category as soon as they cease to be in their natural state, and that it is sufficient if their artificial condition is made to appear in the indictment. Pollock, C. B., in that case went further, and said that he entertained a doubt as to the correctness of the ruling in Reg. v. Cox, supra.

Another case relied on for the defendants was Tate's Case, 1 Lewin, 234. The report is very scanty. All we are told is that the prisoners were "convicted of stealing five hens," and that, as "the indictment contained no averment that they were tame, Bolland, B., arrested judgment." I very much doubt whether that was right. At all events, it does not go any further than Rough's Case.

Lastly, we were referred to Reg. v. Lonsdale, 4 F. & F. 56, where an indictment for stealing "three fowls" was objected to as being ambiguous. Pollock, C. B., said that, if necessary, he would reserve for the Court for Crown Cases Reserved the question whether the subject of the offense charged was sufficiently stated to be the subject of larceny. Those cases to my mind do not compel us to decide that the indictment in the present case insufficiently avers that the pheasants' eggs were so reduced into possession as to be the subject of larceny. The objection to the indictment therefore fails, and the conviction must be affirmed.

I desire to add that I dissent from the proposition contended for by Mr. Rawlinson that the taking of birds' eggs directly from the wild nests amounts to larceny. Whatever other offense such an act may involve, it cannot, in my opinion, support a charge of larceny.[2]

PROTECTOR v. LOWR.

(Upper Bench, 1654. Style, 432.)

Barton moved to quash an indictment preferred against Lowr at the assizes at Cornwall, for speaking of scandalous words against the Parliament. The exception taken was, that it did not appear in the indictment that the Parliament was sitting at the time when the words were spoken. But Roll, Chief Justice, answered: It appears not to us but that the Parliament was sitting at the time; and peradventure it will be made appear at the trial. Therefore plead, and go to trial, and then move in arrest of judgment if you have anything to move.

REGINA v. CLERK.

(Court of King's Bench, 1702. 1 Salk. 377.)

A coroner's inquisition finding that one Clerk, cum cultro jugulum suum voluntarie & felonice & ut felo de se secuit & seipsum murdravit, being removed into this court, was quashed, for that,[3] 1st, The wound ought to be set forth, and it ought to be alleged that it was mortal, and that the party died of it; for it is for that very end and reason that the jury have the view. He might cut his throat, and yet not die of it. And as to the answer, that it shall be intended, because it is said felonice & ut felo de se, it was held, that inquisitions must not be taken by intendment any more than indictments, because the party is to forfeit his goods and chattels by this finding; and although the cut was but a maihem, it might be said to be done felonice. Vide Dy. 68. 2dly, The court held, that such an inquisition would be good without the word "murdravit," and so is Dame Hale's Case; and that if an indictment wants the word "murdravit," it ought not to be quashed for that omission, for it is still a good indictment for manslaughter, though not for murder.[4] It crept in at first to exclude the offender from having clergy, and it continues accordingly. * * *

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[2] Laurance, J., concurred, and Ridley, Darling, and Channell, JJ., delivered concurring opinions which are omitted.

[3] Part of this case is omitted.

[4] Contra: Caldwell v. State, 28 Tex. App. 566, 14 S. W. 122 (1890); Anderson v. State, 5 Ark. 444 (1843).

In indictments for arson, larceny, burglary, and rape, the words "burned," "took," "burglariously," and "ravished" are necessary, in indictments at common law. 1 Chitty Cr. L. 242 et seq. In an indictment for a felony, the

STATE v. KEERL.

(Supreme Court of Montana, 1904. 29 Mont. 508, 75 Pac. 362, 101 Am. St. Rep. 579.)

CALLAWAY, C.[5] The defendant has appealed from a judgment finding him guilty of murder in the second degree, and from an order denying his motion for a new trial. A number of errors are assigned.

* * *

After alleging the infliction of certain mortal wounds, the information continues, "of which said mortal wounds the said Thomas Crystal did then and there languish and languishing did live, and thereafter, on the 21st day of April, A. D. 1902, at the county of Lewis and Clarke, in the state of Montana, the said Thomas Crystal died." An information must be direct and certain as regards the party charged, the offense charged, and the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. Pen. Code, § 1834. It is not permissible to convict the defendant upon mere inferences; he must be directly, plainly, and specifically charged with the commission of a certain crime, and it must be proved substantially as alleged in order to convict him.

In order to convict an accused of murder, the fact of the killing by him as alleged must be proved beyond a reasonable doubt. Pen. Code, § 358. The fact that the defendant inflicted upon another human being a mortal wound deliberately, premeditatedly, with malice aforethought, and with the intent to kill the victim, is not sufficient to substantiate a charge of murder. The victim must die of the mortal wound, and within a year and a day after the stroke is received or the cause of death administered. Pen. Code, § 357. If the victim die of the mortal wound, but after a year and a day have elapsed since its infliction, the defendant may not be convicted of either murder or manslaughter. Neither can he be so convicted if, while the victim is languishing because of the mortal wound, death ensue from some cause not connected with or a consequence of the wound. For these reasons the information should directly allege that death resulted from the mortal wounds inflicted by the defendant.

This view being so clearly correct in principle, it would seem that no citation of authorities is necessary, but see Clark on Criminal Pro-

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word "feloniously" is necessary, as is the word "treasonably" in an indictment for treason. See 2 Hawk. P. C. c. 25, § 55.

In some crimes the use of certain technical words sufficiently charges certain elements of the crime. Thus, the word "ravish" sufficiently charges force and violence, and lack of consent. Harman v. Commonwealth, 12 Serg. & R. (Pa.) 69 (1824). The word "adultery" expresses carnal knowledge. Helfrich v. Commonwealth, 33 Pa. 68, 75 Am. Dec. 579 (1859). And the use of the word "assault" makes it unnecessary to state the acts constituting the assault. State v. Clayton, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565 (1890).

[5] Part of this case is omitted.

cedure, 178; People v. Lloyd, 9 Cal. 55; Commonwealth v. Macloon, 101 Mass. 1, 100 Am. Dec. 89; State v. Sundheimer, 93 Mo. 311, 6 S. W. 52; Maxwell's Criminal Procedure, 180; Bishop's New Criminal Procedure, §§ 527, 531, 532; Wharton's Criminal Law (10th Ed.) § 536. In Lutz v. Commonwealth, 29 Pa. 441, while an indictment containing language similar to the one at bar was sustained, the court say: "This indictment is not artistically expressed. Its grammatical construction is open to criticism, and it trenches hard on those rules of certainty which obtain in criminal pleading."

The Attorney General relies on the concluding clause of the information as supplying the defect, because it alleges, "and so the said James S. Keerl did in the manner and form aforesaid willfully, unlawfully, feloniously and of his deliberately premeditated malice aforethought kill and murder the said Thomas Crystal." These words "are the mere conclusions drawn from the preceding averments. If the averments are bad, the conclusion will not aid them; if they are good, and sufficiently describe the crime as the law requires, * * * the formal concluding words are immaterial." Territory v. Young, 5 Mont. 244, 5 Pac. 248; State v. Northrup, 13 Mont. 522, 35 Pac. 228. We cannot give our approval to this information.

As this case must go back for a new trial, the information may be amended by leave of the court to conform to the views herein expressed. * * * [6]

STATE v. CONLEY.

(Supreme Judicial Court of Maine, 1854. 39 Me. 78.)

At the March term, 1854, the prisoners were tried before Shepley, C. J., on an indictment as follows:

"State of Maine.

"Cumberland, ss.—At the Supreme Judicial Court, begun and holden at Portland, within and for the county of Cumberland, on the first Tuesday of March, in the year of our Lord one thousand eight hundred and fifty-four.

"The jurors for said state upon their oaths present that Martin Conley and John Conley, of Portland, in the county of Cumberland, laborers, on the twelfth day of February, in the year of our Lord one thousand eight hundred and fifty-four, at Portland in said county of Cumberland, with force and arms, in and upon one Thomas Guiner, feloniously, willfully and of their malice aforethought, did make an assault, and that they, the said Martin Conley and John Conley, then and there with certain dangerous weapons, to wit, certain wooden clubs, of the length of four feet and of the thickness of two inches, which they, the said Martin Conley and John Conley, then and there, in both of their hands had and held, the said Thomas Guiner, in and upon the front and upper part of the head of him, the said Thomas Guiner, then and there feloniously, willfully and of their malice aforethought, did strike and beat, giving unto him, the said Thomas Guiner, then and there with the said dangerous weapons, to wit, with the said wooden clubs, of the length of four feet and of the thickness of two inches, two mortal wounds, of which said mortal wounds he, the said Thomas Guiner, on the twenty-first day of February now last past, at Portland aforesaid in the county aforesaid, did languish and die. And so the jurors aforesaid, upon their oath aforesaid do say, that the said Martin Conley and John Conley, him, the said Thomas Guiner, in manner and form aforesaid, feloniously, willfully and of their malice aforethought, did kill and murder, against the peace of said state, and contrary to the form of the statute in such case made and provided." * * *

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[6] Cf. Lutz v. Commonwealth, 29 Pa. 441 (1857); Shay v. People, 22 N. Y. 317 (1860).

Tenney, J.[7] * * * The fifth cause for the arrest of judgment is that the indictment contains no allegation of the length, breadth or depth of the wounds alleged to have been caused by the striking of the prisoners. When death is occasioned by a wound, it should be stated to have been mortal. It must appear from the indictment that the wound given was sufficient to cause the death; and for this reason, unless it otherwise appear, that the length and depth must be shown; but it is not necessary to state the length, depth or breadth of the wound~~, if it appear that it contributed~~ to the party's death. Rex v. Mosley, 1 Ry. & Moody, C. C. 97. In the case referred to, there were several wounds, and it was held by Abbott, C. J., Best, C. J., Alexander, C. B., Graham, B., Bayley, J., Park, J., Burrow, J., Garrow, B., Hullock, B., and Gasalee, J., to be unnecessary to describe the length, breadth or depth of the wounds. Holroyd, J., and Littledale, J., were of a contrary opinion.

In Rex v. Tomlinson, 6 Car. & P. 370, it is said by Patterson, J.: "My brother recollects the case (Rex v. Mosley) perfectly well, and informs me that it was very much discussed, and that the ground of the decision was that, as common sense did not require the length, breadth and depth of the wounds to be stated, it was not necessary that they should be stated; that case is therefore a direct authority against the objection, and in consequence the objection cannot prevail."

Another ground for the arrest of the judgment is that it is not alleged in the indictment that the wounds described therein, or either of them, were given, caused or produced by the striking alleged, the necessary averment "by the stroke or strokes aforesaid" being omitted. It is averred in the indictment that the prisoners then and there with the dangerous weapons, etc., which they then and there in both their hands, had and held, the said Thomas Guiner, in and upon the front and upper part of the head, etc., did strike and beat, giving unto him, etc., then and there with said dangerous weapons, etc., two mortal wounds, of which said mortal wounds, the said Thomas Guiner, on the 21st day of February aforesaid, did languish and die. It is not easy to perceive in what respect the allegation fails to be sufficient. It is full, that the prisoners struck and beat the deceased, giving unto him two mortal wounds with the dangerous weapons, before described, which they in both their hands had and held, of which said mortal wounds the deceased died. It necessarily follows, from the facts alleged in language sufficiently accurate and technical, that the strokes inflicted by the prisoners caused mortal wounds, which produced the death charged in the indictment.

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[7] Part of this case is omitted.

The eighth objection to the indictment is that it does not contain the allegation that the deceased, of the said mortal wounds, on and from the said twelfth day of February, etc., until the twenty-first of the same February, did suffer and languish, and languishing did live. The prisoner's counsel, in support of this objection, refer to certain precedents of forms of indictment, without any other authority that this allegation is essential. It is held, however, that the time both of the stroke and death should be stated on the record, the former because the escheat and forfeiture of lands relate to it, the latter in order that it may appear that the death took place within a year and a day after the mortal injury was received. 1 Chitty's Cr. Law, 222; 3 Ibid. 736. It being alleged in the indictment now under consideration that the deceased did languish and die on the twenty-first day of February, in the year of our Lord 1854, of the mortal wounds inflicted on the 12th day of the same month, in full, precise, and technical language, the reason of the principle is satisfied. And no rule of law which can be found being violated, the indictment is regarded sufficient in this respect. * * *

Exceptions and motion overruled.[8]

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[8] "An indictment of murder or manslaughter hath these certainties and requisites to be added to it more than other indictments, for it must not be only felonice, and ascertain the time of the act done, but must also:

"(1) Declare how, and with what it was done, namely, cum quodam gladio, etc.

"Yet if the party were killed with another weapon, it maintains the indictment; but if it were with another kind of death, as poisoning, or strangling, it doth not maintain the indictment upon evidence. 2 Co. Inst. 319; Co. P. C. p. 48.

"So if A. be indicted for poisoning of B. it must allege the kind of poison, but if he poisoned B. with another kind of poisoning, yet it maintains the indictment, for the kind of death is the same.

"(2) He must shew in what hand he held his sword.

"If an indictment runs thus, that cum quodam gladio, quem in dextra sua tenuit, percussit, without saying in dextra manu, for this cause an indictment was quashed. P. 44 Eliz. B. R., Cuppledike's Case, 3 Coke, 5b.

"(3) Regularly it ought to set down the price of the sword or other weapon,

PEARCE v. STATE.

(Supreme Court of Tennessee, 1853. 1 Sneed, 63, 60 Am. Dec. 135.)

TOTTEN, J., delivered the opinion of the court.[9]

James Pearce was convicted in the circuit court of Rhea on a presentment for illegal voting. He moved for a new trial, and in arrest, and, the motions being severally overruled, he appealed in error to this court. * * *

The presentment avers, in substance, that in the election for President and Vice President of the United States, in 1848, the defendant unlawfully and knowingly voted in the county of Rhea; he, the defendant, "not being a qualified voter in and for said county of Rhea."

The act of ~~1844 (chapter 31, § 1) provides that~~ if a person vote at any election held under the Constitution and laws of this state, "such person not being at the time a qualified voter of the county in which he so votes, he shall be adjudged guilty of a misdemeanor."

We think the presentment bad. The nature and cause of the accusation are not well stated. Const. art. 1, § 9. The presentment is in the words of the statute; and the words are, "a qualified voter." That

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or else say nullius valoris, for the weapon is a deodand forfeited to the king, and the township shall be charged for the value if delivered to them.

"But this seems not to be essential to the indictment.

"(4) It ought to show in what part of the body he was wounded, and therefore if it be super brachium, or manum, or latus, without saying whether right or left, it is not good. Long's Case, 5 Coke, 121b.

"So if it be in sinistro bracio, where it should be brachio, it is not good, because insensible. T. 31 Eliz. B. R., Webster's Case.

"So if the wound be laid circiter pectus, it is not good. T. 29 Eliz., Clenche's Rep. 10. Super partes posteriores corporis not good. H. 23 Car. I, B. R., Savage's Case, Style, 76.

"But super faciem, or caput, or super dextram partem corporis, or in insima parte ventris are certain enough. Long's Case, 5 Coke, 121b.

"(5) Regularly the length and depth of the wound is to be shewed, but this is not necessary in all cases, as, namely, where a limb is cut off. Haydon's Case, 4 Coke, 42a. So it may be also a dry blow, and plaga is applicable to a bruise or a wound.

"But though the manner and place of the hurt and its nature be requisite, as to the formality of the indictment, and it is fit to be done, as near the truth as may be, yet if upon evidence it appear to be another kind of wound in another place, if the party died of it, it is sufficient to maintain the indictment.

"(6) It is usual to allege the party stricken to have been in pace Dei et domini regis, but not necessary to be inserted. Haydon's Case, 4 Coke, 41b." 2 Hale, P. C. 185, 186.

Statutes have been very generally adopted making it unnecessary to set forth the means employed in causing the death. See Catchcart v. Commonwealth, 37 Pa. 108 (1860).

"The fourth exception was because the depth and breadth of the wound was not shown, as is always usual in indictments, so that it may appear to the court that the wound was mortal. But it was answered and resolved by the court that it could not be in this case, because all the pan of the knee was entirely cut off; as if an arm or leg is cut off, or if a man is beheaded, the depth or breadth of the wound shall not be shown." Haydon's Case, 4 Coke, 41 (1585).

[9] Part of this case is omitted.

is not a fact, but a legal result; and for the facts which constitute a qualified voter we are to refer to the Constitution and laws, from which it will be seen that there are several grounds of disqualification: (1) If he be not a free white man, twenty-one years of age. (2) If he be not a citizen. (3) If he has not resided in the county six months as a citizen thereof.

Now, for which of these causes was the defendant disqualified? The presentment does not inform him, and the cause can only appear in the proof, when he may be taken by surprise, and be wholly unprepared to make his defense, however just and valid it may be.

The rule is that "the indictment must charge the crime with certainty and precision, and must contain a complete description of such facts and circumstances as will constitute the crime. A statement of a legal result is bad." 1 Chit. Cr. L. 228. A conclusion of law need not be stated. It is the facts upon which it is founded that are necessary and material. 1 Chit. Cr. L. 231.

We may further observe that where the act is not, in itself, necessarily unlawful, but becomes so by other facts connected with it, the facts in which the illegality consists must be set forth and averred. 1 Chit. Cr. L. 229.

Now, the act of voting is not necessarily illegal, but may become so for some of the causes before stated; and, in order that the charge may be perfect, such cause must be set forth and averred in the indictment or presentment. The ground of disqualification not being averred in the present case, the judgment will be reversed, and the motion in arrest sustained.

Judgment reversed.

STATE v. HADDONFIELD & C. TURNPIKE CO.

(Supreme Court of New Jersey, 1900. 65 N. J. Law, 97, 46 Atl. 700.)

Case certified from court of oyer and terminer, Camden county.

The Haddonfield & Camden Turnpike Company was indicted for neglecting to keep its road in repair, and demurred to the indictment. Case certified, and court advised that defendant was entitled to judgment on its demurrer.

GUMMERE, J. The defendant is indicted for neglecting to keep its turnpike road in repair. The ground of demurrer is that the indictment fails to show how the defendant's obligation to keep its road in repair arises.

The pleading demurred to, after alleging that the defendant is in possession of the turnpike, and that the same is out of repair, charges that the defendant is "by law holden and bound the said turnpike road to repair and amend," etc. The rule with relation to the necessity of setting forth in an indictment how the duty arose for the neglect to perform which the defendant is presented is thus stated in State v.

Hageman, 13 N. J. Law, 314: "Where an offense consists in an omission to do some act, the indictment must show how the defendant's obligation to perform that act arises, unless it is a duty connected by law to the office which the defendant sustains." To the same effect is State v. President, etc. of New Jersey Turnpike Co., 16 N. J. Law, 222.

It is contended on behalf of the state that the legal duty of the defendant to repair and amend its turnpike is created by its charter, and that, as the charter is a law of the state, the allegation of the indictment is sufficient, the case being within the exception mentioned in State v. Hageman. This contention would be sound if the charter of the company was a public act, provided it casts upon the company the duty of repair. But the charter is a private act, and we cannot take judicial notice of its contents. 1 Chit. Pl. 216. The indictment should have set out the charter provision, from which the duty of the defendant to repair and amend its road is claimed to arise, and is fatally defective in not doing so.

The Camden oyer and terminer is advised that the defendant is entitled to judgment on its demurrer.

HARMAN v. JACOB.

(Upper Bench, 1651. Style, 256.)

In an arrest of judgment upon a verdict given against an alien in an indictment upon the statute of 22 H. VIII, c. 13, for using a trade, exception was first taken. * * * 2dly. The indictment doth not say that he is alienatus extra Angliam. And this was held a good exception.[10]

REX v. ———.

(Court of King's Bench, 1819. 1 Chitty, 698.)

Platt moved to quash the indictment in this case, or for a rule to show cause why the prosecutor should not deliver to the defendant a bill of particulars of divers goods referred to in the indictment. As to the first part of his motion, he submitted that the indictment was bad for the uncertainty and generality of its allegations. It was an indictment for a conspiracy "to defraud John Wheatley of divers goods, and in pursuance of that conspiracy defrauding him of divers goods, to wit, of the value of one hundred pounds." This allegation, he contended, was too uncertain, for the indictment should have particularized the specific goods of which the prosecutor was supposed to have been defrauded. If this was an indictment for felony in stealing the goods of Wheatley, it was clear this allegation would not do, because the indictment could not set out the goods in the general way. By analogy to the rule in cases of felony, he submitted that, in such an indictment as this, the goods should be particularized for the information of the defendant, who in this case had been a servant of the prosecutor for twelve months, during which time he had transacted sales for his employer in two hundred different instances, amounting in all to the value of £25,000. It was of the utmost importance therefore to this defendant, that he should be apprised of the particulars of the alleged fraud, in order that he might be enabled to meet the charge, and prove his innocence. As to the second part of the motion, he admitted that it was unprecedented, but he submitted, supposing the indictment to be good, that the court would in such a case and under such circumstances call upon the prosecutor to deliver a particular of the transaction to which he meant to apply his evidence.

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[10] Part of this case is omitted.

Bayley, J.[11] This case is not analogous to an indictment for felony in stealing goods, because the conspiracy is the gravamen of the present indictment. The conspiracy may be to defraud the prosecutor, not of any particular goods, but of any goods he can get hold of; and it is not often in the power of a prosecutor to specify the particular goods of which he has been defrauded, because the object of the conspiracy may itself be uncertain. With respect to the application for a bill of particulars, it is quite new, and I think we cannot now make a precedent, without very serious consideration.

Holroyd, J., was of the same opinion.

Rule refused.

COMMONWEALTH v. HERSEY.

(Supreme Judicial Court of Massachusetts, 1861. 2 Allen, 173.)

Indictment for murder.

Bigelow, C. J.[12] The motion in arrest of judgment in the present case is founded on the omission to aver that the defendant, in administering poison to the deceased, did it with an intent to kill and murder.

* * *

There can be no doubt that, in every case, to render a party responsible for a felony, a vicious will or wicked intent must concur with a wrongful act. But it does not follow that, because a man cannot commit a felony unless he has an evil or malicious mind or will, it is necessary to aver the guilty intent as a substantive part of the crime in giving a technical description of it in the indictment. On the contrary, as the law presumes that every man intends the natural and necessary consequences of his acts, it is sufficient to aver in apt and technical words that a defendant committed a criminal act, without alleging the specific intent with which it was done. In such case, the act necessarily includes the intent. Thus, in charging the crime of burglary, it is not necessary to aver that the breaking and entering a house was done with an intent to steal. It is sufficient to charge the breaking and entering and an actual theft by the defendant. The reason is that the fact of stealing is the strongest possible evidence of the intent, and the allegation of the theft is equivalent to an averment of that intent. Commonwealth v. Hope, 22 Pick. 1, 5; 2 East, P. C. c. 15, § 24.

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[11] The opinion of Abbott, C. J., is omitted.

[12] Part of this case is omitted.

So in an indictment for murder by blows or stabs with a deadly weapon, it is never necessary to allege that they were inflicted with an intent to kill or murder. The law infers the intent from proof that the acts were committed, and that death ensued. The averment, therefore, of the criminal act comprehends the evil or wicked intention with which it was committed. The true distinction seems to be this: When by the common law or by the provision of a statute a particular intention is essential to an offense, or a criminal act is attempted but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctness and precision, and to support the allegation by proof. On the other hand, if the offense does not rest merely in tendency, or in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed and need not be alleged, or, if alleged, it is a mere formal averment, which need not be proved. In such case, the intent is nothing more than the result which the law draws from the act, and requires no proof beyond that which the act itself supplies. 1 Stark. Crim. Pl. 165; 1 Chit. Crim. Law, 233; King v. Philipps, 6 East, 474; 1 Hale, P. C. 455; Commonwealth v. Merrill, 14 Gray, 415, 77 Am. Dec. 336.

To illustrate the application of the rule, take the case of an indictment for an assault with an intent to commit a rape. The act not being consummated, the gist of the offense consists in the intent with which the assault was committed. It must therefore be distinctly alleged and proved. But in an indictment for the crime of rape no such averment is necessary. It is sufficient to allege the assault, and that the defendant had carnal knowledge of a woman by force and against her will. The averment of the act includes the intent, and proof of the commission of the offense draws with it the necessary inference of the criminal intent. The same is true of indictments for assault with intent to kill, and murder. In the former, the intent must be alleged and proved. In the latter, it is only necessary to allege and prove the act.

The application of this principle to the case at bar is decisive of the question raised by the present motion. There is nothing in the nature of the crime of murder by poison to distinguish it from homicide by other unlawful means or instruments, so as to render it necessary that it should be set out with fuller averments concerning the intention with which the criminal act was committed. If a person administers to another that which he knows to be a deadly poison, and death ensues therefrom, the averment of these facts in technical form necessarily involves and includes the intent to take life. It is ~~the~~ natural and necessary consequence of the act done, from which the law infers that the party knew and contemplated the result which followed, and that it was committed with the guilty intention to take life.

It was urged by the counsel for the prisoner, as an argument in support of the insufficiency of the indictment, that every fact stated in the indictment might have been done by the defendant, and yet he might have committed no offense; that is, that a person might administer to another that which he knew to be a deadly poison, from which death ensued, innocently and without any intent to do bodily harm. In a certain sense this is true. A physician, for example, might in the exercise of due care and skill give to his patient a medicine of a poisonous nature, in the honest belief that it would cure or mitigate disease, but which from unforeseen and unexpected causes actually causes death. And the same is true of many other cases of homicide produced by other means than poison. Take the case of a murder alleged to have been committed by stabs or cuts with a knife. Such wounds may be inflicted innocently and for a lawful purpose. A surgeon in performing a delicate and difficult operation, by a slight deflection of the knife, which the most cautious skill could not prevent, might inflict a wound which destroys life. But it has never been deemed necessary, because certain acts which cause death may be done without any wicked or criminal intent, to aver in indictments for homicide that the person charged acted with an intent to take life. The corrupt and wicked purpose with which a homicidal act is done is sufficiently expressed by the averment that it was committed willfully and with malice aforethought; and this allegation may be always disproved by showing that the act happened per infortuniam, or was otherwise excusable or justifiable.

Motion in arrest of judgment overruled.

COMMONWEALTH v. BOYNTON.

(Supreme Judicial Court of Massachusetts, Essex, 1853. 12 Cush. 499.)

Indictment upon Rev. St. c. 131, § 1, charging that the defendant "did knowingly sell unto one Jeremiah Barker a certain piece of diseased, corrupted, ~~and unwholesome~~ provision, to wit, one hind leg of veal, the said ~~Boynton~~ not then and there making known fully to said Barker that the same was diseased, corrupted, and unwholesome," etc. After conviction in the court of common pleas, the defendant moved in arrest of judgment for insufficiency of the indictment, which motion being overruled, he appealed to this court.

BIGELOW, J. The motion in arrest of judgment in this case rests mainly on the omission to aver in the indictment a knowledge by the defendant, at the time of the alleged sale, that the meat sold by him was diseased and corrupted. There can be no doubt that the gist of the offense, under Rev. St. c. 131, § 1, upon which this indictment is founded, consists in the guilty knowledge or evil intent of a party in selling meat, which he knows to be unfit for food. This is necessarily implied by the language of the statute, which imposes a penalty upon any person who shall knowingly sell unwholesome provisions "without making the same fully known to the buyer."

Such being the nature of the offense charged upon the defendant, he has a right to insist that it should be formally and substantially described; that is, set out in the indictment with technical precision and accuracy, according to the rules of the common law. Commonwealth v. Davis, 11 Pick. 432, 438; Commonwealth v. Phillips, 16 Pick. 211, 213. It is a familiar rule of criminal pleading that, wherever the intention of a party is necessary to constitute an offense, such intent must be alleged in every material part of the description where it so constitutes it; thus, where a forged order was presented and money obtained thereby, and the indictment alleged that the defendant, with intent to cheat, knowingly pretended it to be genuine, but did not aver the obtaining money thereby to have been done knowingly, it was held bad. 1 Chit. Cr. Law, 232, 233; Rex v. Rushworth, 1 Stark. 396, and Russ. & Ry. 317; Commonwealth v. Slack, 19 Pick. 304, 307.

In the present indictment, the only distinct averment of knowledge on the part of the defendant is that he "knowingly sold" corrupt and unwholesome meat. There is no averment that he knew the meat to be in a diseased and unhealthy state, or unfit for food, at the time of the sale. The word "knowingly" does not apply to and qualify every act charged, essential to constitute the offense under the statute. Strictly speaking, and construing the language of the indictment according to the technical rules of pleading, it qualifies and gives significance only to the word sell; so that in substance and legal effect the averment is only that the act of sale was done by the defendant knowingly. But there is no allegation of any knowledge by him, at the time the sale was made, of the condition of the meat. The whole allegation might, therefore, be true, and yet the defendant might be innocent of any offense. The sale, of itself, is not made criminal; but it is the sale coupled with a knowledge of the diseased state of the thing sold, which constitutes the offense. A person might well sell meat knowingly, and yet be wholly ignorant of its true condition. The averment of knowledge does not extend to each part of the description of the offense, in which it is an essential element. The indictment is, therefore, fatally defective, because it does not describe, in apt and technical terms, any criminal act for which the defendant can be held responsible, or upon which any valid judgment can be rendered.

The precedents of indictments for offenses similar to that intended to be set out in the present indictment are quite numerous, and are uniform in alleging, not only that the act of sale was made knowingly, but also in averring that the defendant well knew, at the time of the sale, the corrupt and unwholesome condition of the articles sold. See 2 Stark. Cr. Pl. 682; 2 Chit. Cr. Law, 556, 558.

Judgment arrested.[13]

REX v. TRIGG.

(Court of King's Bench. Style, 124.)

The court was moved to quash a presentment against Trigg for not going before a justice of peace to take the oath of an headbrow to which office he was chosen at a leet. The exceptions taken against it were, 1. That it doth not ~~appear that~~ any notice was given to him to go before the justice. 2dly, it appears ~~not~~ that the justice had authority to administer the oath. For the first exception the presentment was quashed.[14]

STATE v. HODGES.

(Court of Appeals of Maryland, 1880. 55 Md. 127.)

Robinson, J., delivered the opinion of the court.[15]

The defendant in error ~~was indicted~~ for receiving stolen goods, knowing them to be stolen. A demurrer was filed to the indictment, and the court below sustained the demurrer and quashed the indictment. * * *

The offense in this state has always been considered as a misdemeanor. Kearney's Case, 46 Md. 422. It was not necessary therefore to allege in the indictment that the property in question was feloniously received by the defendant in error. * * *

Where the offense charged is an offense at common law, and is itself manifestly illegal, the averment that it was done unlawfully may not be necessary. 1 Chitty, Crim. Law, 160; 2 Hawk. book 2, § 25. But the mere receipt of stolen goods, knowing them to be stolen, was not per se an offense at common law, because the owner may lawfully receive back his own goods, knowing them to be stolen, provided there be no agreement to favor the thief; or one may lawfully receive stolen property for the purpose of keeping the goods for the owner. 2 East's Crown Law, ch. 25, § 141; 1 Hale, 650. ~~And accordingly~~ we find in Chitty, Archbold, and in fact in all the books of forms, the averment that the ~~goods were unlawfully received~~.

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[13] Compare Commonwealth v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398 (1840); U. S. v. Nathan (D. C.) 61 Fed. 936 (1894).

[14] Accord: State v. Lemay, 13 Ark. 405 (1853); State v. Munch, 22 Minn. 67 (1875).

[15] Part of this case is omitted.

It was suggested in argument that the words "against the peace," etc., to be found in the conclusion of the indictment, is a sufficient averment that the act was done unlawfully. The words "contra pacem," it seems, were considered necessary in all indictments, except for mere nonfeasance, because all offenses subject to public prosecution tend to the disturbance of the public peace.

But where one is charged with a common-law offense, the mere averment that it was done contra pacem does not dispense with the necessity of setting out in proper terms the circumstances necessary to constitute the alleged common-law offense.

It is a general rule that nothing material shall be taken by intendment or implication, but that in all cases the indictment must describe with certainty the offense of which the party is charged, and must aver the facts necessary to constitute such offense. 2 Hawk. 83.

If it be an offense created by statute, it is only necessary to describe it in the language of the statute. In this state, the Code merely prescribes the punishment for receiving stolen goods, and does not in any manner change the nature or character of the offense itself. It is necessary, therefore, to set out in the indictment all the circumstances necessary to constitute the offense at common law, and inasmuch as it was necessary at common law, ~~to constitute~~ the offense, that the party charged should receive ~~the property~~ unlawfully, we are of opinion that it must be so averred in the indictment. The indictment in this case does not allege that the goods were unlawfully received by the traverser, and the judgment must therefore be affirmed.[16]

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[16] If malice be a necessary ingredient of the offense, malice must be alleged. Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544 (1854).

So, when knowledge of certain facts is essential to the offense, the indictment must aver such knowledge. People v. Behee, 90 Mich. 356, 51 N. W. 515 (1892).

"In the case of Wong v. Astoria, 13 Or. 538, 11 Pac. 295, it was held that to allege that an act was done 'willfully and unlawfully' was equivalent to alleging that it was done 'knowingly.' In the case of Weinzorpflin v. State, 7 Blackf. (Ind.) 186, 195, it is said among other things, as follows: '"Feloniously" is substituted for it [the word "unlawfully"] in this indictment, and is not tantamount to it, but is a word of far more extensive criminal meaning. The act complained of could not have been done feloniously, and not unlawfully done.' In the case of Carder v. State, 17 Ind. 307, it is said 'that the word "feloniously," in the connection in which it was used in the indictment, was identical in its import with the word "purposely."' In the case of Commonwealth v. Adams, 127 Mass. 15, 17, it is said: 'But the allegation that the defendant maliciously and feloniously incited and procured principal to commit the felony ex vi termini imports that she acted with an unlawful intent.' In the case of Allen v. Inhabitants, 3 Wils. 318, it is said as follows: 'Here he (the prosecutor) has alleged in his declaration * * * that the same was committed and done feloniously; and that act, which was committed feloniously, was certainly done willfully, unlawfully, and maliciously, for

STATE v. DORAN.

(Supreme Judicial Court of Maine, 1904. 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278.)

WHITEHOUSE, J.[17] It is alleged in the indictment that the defendant, "with force and arms, the car numbered 18,656 of the Boston & Maine Railroad * * * feloniously, willfully, and maliciously did attempt to break and enter for the purpose of committing a felony." The jury returned a verdict of guilty, and the defendant moved in arrest of judgment; among other reasons, "because no specific offense against the laws of this state is alleged against the said Doran in said indictment, and that no judgment could be rendered upon the verdict in said court." The motion was overruled by the presiding judge, and the case comes to this court on exceptions to this ruling.

The indictment appears to be founded on section 9 of chapter 132, Rev. St., relating to "attempts to commit offenses," and section 8 of chapter 120, Rev. St., descriptive of the offense which the defendant was charged with attempting to commit. Section 9 of chapter 132 provides that "whoever attempts to commit an offense, and does anything towards it, but fails, or is interrupted or prevented in its execution," shall be punished as therein provided; and section 8 of chapter 120 declares that "whoever, with intent to commit a felony, breaks and enters a * * * railroad car of any kind, or building in which valuable things are kept," shall suffer the penalty therein specified.

It appears from a comparison of these provisions with the language of the indictment that only the general terms of the statute have been employed to state the charge against the defendant, both with respect to the "attempt" to commit the offense and the "felony" which he intended to commit. The indictment contains neither a description of the overt act done by the accused in attempting to commit the crime charged, nor a specification of the particular felony which the defendant is charged with attempting to commit after breaking and entering the car.

Where the offense is created by statute, and the facts constituting it are fully set out, it is undoubtedly sufficient to charge the offense in the language of the statute without further description. 1 Bish. Cr. Proc. § 611. But "in all criminal prosecutions the accused shall have a right * * * to demand the nature and cause of the accusation." Const. Me. art. 1, § 6. He has a right to insist that the facts alleged to constitute a crime shall be stated in the indictment against him with that reasonable degree of fullness, certainty, and precision requisite

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doing an act feloniously is doing it malo animo, viz., with malice.'" Valentine, J., in State v. Bush, 47 Kan. 201, 27 Pac. 834, 13 L. R. A. 607 (1891).

In Kitchinman's Case, Style, 374 (1653), Roll, C. J., said: "It is said to be preferred malitiose and it cannot be malitiose except it be also falsely."

[17] Part of this case is omitted.

to enable him to meet the exact charge against him, and to plead any judgment which may be rendered upon it in bar of a subsequent prosecution for the same offense.

Hence, if a statute creating an offense fails to set out the facts constituting it sufficiently to apprise the accused of the precise nature of the charge against him, a more particular statement of the facts will be required in the indictment. "And where a more generic term is used, or where the words of the statute by their generality may embrace cases which fall within the terms but not within the spirit or meaning thereof, the specific facts must be alleged to bring the defendant precisely within the inhibition of the law." Enc. of Pl. and Prac. vol. 10, p. 487; Wharton's Cr. Pl. and Prac. § 220. Indeed, it is an elementary rule of criminal pleading that every fact or circumstance which is a necessary ingredient in a prima facie case of guilt must be set out in the indictment.

With respect to indictments for attempts to commit offenses Mr. Bishop says: "An attempt is an intent to do a particular criminal thing with an act towards it falling short of the thing intended [1 Bish. Cr. Law, § 728], and on principle we see that we must set out the act which was committed and the specific intent which accompanied it." Bish. on Stat. Cr. § 394; 2 Crim. Proc. §§ 1, 92; Directions and Forms, § 100. * * *

Again, as already noted, the indictment fails to specify the particular felony which it is alleged the defendant intended to commit. This is another fatal defect. The word "felony" is not the name of any distinctive offense. It is a generic term, employed to distinguish certain high crimes, as murder, robbery, rape, arson, and larceny, from other minor ones, known as "misdemeanors." The averment that the defendant broke and entered the car for the purpose of committing a felony wholly failed to apprise him of the specific offense which it is claimed he intended to commit. Whether it would be contended by the state that he intended to commit murder, or robbery, or rape, or larceny, he is not informed. Upon the trial of such an indictment he was liable to be oppressed by the introduction of evidence which he could not anticipate or be prepared to meet. * * *

Motion sustained. Judgment arrested.[18]

II. AVERMENT OF TIME AND PLACE OF THE OFFENSE

ANONYMOUS.

(Court of King's Bench, 1486. Year Book 2 Hen. VII, 10, pl. 6.)

In the King's Bench upon an indictment taken in the sheriff's tourn it was found that one J. with force and arms on the first day of May at H. and the fourth day of May at C. in D. made an assault, beat, and grievously maltreated, and one horse of the value of, etc. then and there being, feloniously stole, took and carried away, and because there were in the commencement two several days and places, and in the conclusion it was then and there one horse, etc. and there cannot be a felony laid in two places at two times, without special matter. (For a felony cannot be done except at one time and in one place, and it is uncertain, in which of the said places, or on which of the said days it is intended, and so it is uncertain.) And because of this, as to the felony let him go quit.

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[18] Accord: Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544 (1854).

COTTON'S CASE.

(Court of Queen's Bench, 1599. Cro. Eliz. 738.)

Cotton, an attorney of the Queen's Bench, was indicted, for that he such a day, year, and place, having an axe covertly in his hand, feloniously struck one Margaret Spencer, whereof she the same day and year died. Exception was taken to the indictment, because there was not any place alledged where he struck her, nor where she died.

Popham, J. For the first, it is all one with Lewis's case, in this court, which was ruled to be ill for this cause; for there it was that he, such a day, year, and place, having such a weapon in his hand, feloniously struck the party, dans ei unam plagam mortalem, so there was not any place alledged where he struck, but only where he had the weapon in his hand. Wherefore it was resolved to be ill. It is also ill for the other reason; because it is not shown where she died.[19]

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[19] The place of every material fact must be stated with sufficient certainty to show that the court has jurisdiction of the cause (State v. Johnson, 32 Tex. 96 [1869]), and to enable the defendant to prepare his defense, and to plead the judgment upon the indictment in bar of a second prosecution for the same offense (State v. Cotton, 24 N. H. 143 [1851]). It is usual to state the county in which the offense was committed; but it is sufficient, at least in indictments for offenses not capital (Commonwealth v. Springfield, 7 Mass. 9 [1810]), to give a more particular description of the place, as a certain town, if the court can take judicial cognizance of the fact that such place is entirely within the county (Vanderwerker v. People, 5 Wend. 530 [1830]).

If the jurisdiction of the court is not coextensive with the county, it is not sufficient to state that the offense was committed in the county. A more minute description of the place is necessary. People v. Wong Wang, 92 Cal. 277, 28 Pac. 270 (1891). So if the act alleged be a crime only when done in a particular locality, it must be averred that it was done in such locality. State v. Hogan, 31 Mo. 340 (1861). For the venue of offenses begun in one locality and completed in another, see Connor v. State, 29 Fla. 455, 10 South. 891, 30 Am. St. Rep. 126 (1892); Morrissey v. People, 11 Mich. 327 (1863).

If a minor locality has been averred, it need not be proved as laid. Proof that the offense was committed anywhere within the jurisdiction of the court will suffice (Commonwealth v. Tolliver, 8 Gray [Mass.] 386, 69 Am. Dec. 252 [1857]), unless the statement of the minor locality is necessary to a proper description of the offense. (People v. Slater, 5 Hill [N. Y.] 401 [1843]). Commonwealth v. Heffron, 102 Mass. 148 [1869]). Cf. State v. Verden, 24 Iowa, 126 (1867). If such description is essential, it must be proved as described, even though the description be unnecessarily minute. State v. Kelley, 66 N.

STATE v. JOHNSON.

(Supreme Court of Texas, 1869. 32 Tex. 96.)

The appellee was indicted for the theft of $160 in coin and $60 in currency, the property of B. H. Denson. The indictment was quashed on his motion, and the district attorney appealed on behalf of the state.

E. B. Turner, Attorney General, for the State, conceded the insufficiency of the indictment.

LINDSAY, J. The motion to quash the indictment in this case was properly sustained. There is no allegation in it of either the time or of the place of the commission of the offense. The first is necessary, that it may appear from the charge it is not barred by the statute of limitations. The other is indispensable, that the court may know whether it has jurisdiction of the cause.

For these defects it was rightfully quashed. The judgment is affirmed.

ANONYMOUS.

(Upper Bench, 1655. Style, 448.)

The court was moved to quash an indictment grounded upon the statute of 5 Eliz. preferred against one for using the trade of a draper, not having served as an apprentice in that trade, according to the statute, upon these two exceptions: 1. It is said he used the trade in the year 1653, and doth not say the year of our Lord. 2dly. It is not said that the jury was returned, nor whence they were, and both exceptions were held good by ROLL, Chief Justice, and the indictment was thereupon quashed.

H. 577, 29 Atl. 843 (1891). Where the venue has been properly stated in the caption, or commencement, it is sufficient to charge that the act was done "then and there" (State v. Slocum, 8 Blackf. [Ind.] 315 [1846], or "in the county aforesaid" (Eaves v. State, 113 Ga. 749, 39 S. E. 318 [1901]).

St. 14 & 15 Vict. c. 100, § 23, provides: "It shall not be necessary to state the venue in the body of any indictment, but the county, city or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment: Provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment. * * * " More or less similar statutes have been enacted in some of the United States. See State v. Keel, 54 Mo. 182 (1873). Code Cr. Proc. N. Y. § 284, makes it a requisite for a valid indictment that "it can be understood therefrom that the crime was committed at some place within the jurisdiction of the court." See People v. Horton, 62 Hun, 610, 17 N. Y. Supp. 1 (1892). A similar provision is contained in Comp. Laws Nev. § 4208. See State v. Buralli, 27 Nev. 41, 71 Pac. 532 (1903).

REX v. MASON.

(Court of King's Bench, 1680. 2 Show. 126.)

Indictment against the defendant on the statute 33 Hen. VIII, c. 9, for shooting in a gun, quod non habens terras aut tenementa ad valorem nono die Aprilis anno, &c. apud, &c. sagittavit.

Exception was taken and allowed, for that "he not having" shall be intended to relate to the time of the indictment, and not to the time of the fact.

And therefore quashed.[20]

MOLETT v. STATE.

(Supreme Court of Alabama, 1859. 33 Ala. 408.)

A. J. Walker, C. J.[21] The indictment, found on the 17th November, 1857, alleges the offense to have been committed before the finding of the indictment and after the 1st day of March, 1856. The offense may have been committed after the 1st day of March, 1856, and not within 12 months before the finding of the indictment. The indictment fails, therefore, to show the commission of the misdemeanor within the period prescribed by the statute of limitations. Before the Code, this would have been a fatal objection; but it is not now necessary to make any averment that the indictable act was done within the time mentioned in the statute of limitations. No specification of the time is necessary, unless time is a material ingredient of the offense. Code, § 3512; and form No. 1, page 698.[22]

The forms prescribed by the Code make sufficient an allegation that the offense was committed before the finding of the indictment. It cannot vitiate that the indictment, instead of embracing within its allegation all past time, limits to a certain specified day in the past the period within which the offense was committed. * * *

The judgment of the court below is reversed, and the cause remanded.

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[20] Accord: Sikes v. State, 67 Ala. 77 (1880).

[21] Part of this case is omitted.

[22] Many states have similar statutes. See State v. Ackerman, 51 La. Ann. 1213, 26 South. 80 (1899); State v. Peters, 107 N. C. 876, 12 S. E. 74 (1890). See, also, Fleming v. State, 136 Ind. 149, 36 N. E. 154 (1894).
Compare Ruge v. State, 62 Ind. 388 (1878).

STATE v. BEATON.

(Supreme Judicial Court of Maine, 1887. 79 Me. 314, 9 Atl. 728.)

On exceptions by respondent from Supreme Judicial Court, Lincoln county.

An appeal from the decision of a trial justice on a complaint and warrant for fishing for and catching lobsters in violation of law.

Walton, J. Neither a complaint nor an indictment for a criminal offense is sufficient in law, unless it states the day, as well as the month and year, on which the supposed offense was committed. In this particular, the complaint in this case is fatally defective. It avers that "on sundry and divers days and times between the twenty-third day of September, A. D. 1885, and the thirtieth day of September, A. D. 1885," the defendant did the acts complained of. But it does not state any particular day on which any one of the acts named was committed. Such an averment of time is not sufficient. State v. Baker, 34 Me. 52; State v. Hanson, 39 Me. 337, and authorities there cited.

Exceptions sustained. Complaint quashed.

Peters, C. J., and Virgin, Libbey, Emery, and Haskell, JJ., concurred.

STATE v. CITY OF AUBURN.

(Supreme Judicial Court of Maine, 1894. 86 Me. 276, 29 Atl. 1075.)

Peters, C. J. The city of Auburn, having been indicted for its failure to open a highway laid out within its limits by county commissioners, claims, upon demurrer thereto, that the indictment found against them is insufficient in some respects.

It is contended that it is bad because the city of Auburn, so named in the indictment, is not described as a corporation of any kind, and more especially because there is no averment that the city of Auburn is situated within any county of this state. Such omissions are undoubtedly formal defects, indicating a want of care in the work of the pleader that is not to be commended. The omissions are supplied, however, to some extent by certain indirect allegations contained in the indictment. The way is alleged to have been laid out by the commissioners of Androscoggin county within the city of Auburn, and the indictment avers that it was found at a term of court begun and holden at Auburn within and for the county of Androscoggin. Aided by these implications, we deem it warrantable for us to determine as a matter of judicial knowledge that the city of Auburn described in the indictment is the municipal corporation of that name situated in our county of Androscoggin. The case of Com. v. Desmond, 103 Mass. 445, supports this view.

The indictment further alleges that the mandate of the commissioners required that the way should be opened and built by the city within three years from March 31, 1890, and that for the period of time between March 31, 1890, and March 31, 1893, as well as ever since, the city had wholly neglected to open and build the same; and it is contended by the defense that such an averment as to the time of the commission of the alleged offense is bad for its generality. In support of this objection the defense invokes the general principle of pleading, recognized in our own cases, that some particular day must be named in the indictment on which the alleged offense was committed, and that, too, even if the offense be set out with a continuando.

In our view, this criticism does not fairly apply to an indictment like the present. The principle referred to applies mostly to offenses of commission, and not to those of omission; to acts done, rather than acts omitted to be done; to offenses accomplished by active, and not passive, means. Of course, the principle contended for would apply as strongly to an act of nonfeasance as to an act of misfeasance, when such act can be logically and correctly described as having been done on some particular day, or upon some continuous days. In the present case it would not be true to charge the offense as committed on either the first or the last day of the three years allowed the city within which to construct the contemplated road, or on any intermediate day or days, or as committed upon any time short of the whole period of three years. The offense was growing for three years, culminating at the expiration of that period. The ruling of the court on an analogous question in Smiley v. Inhabitants of Merrill Plantation, 84 Me. 322, 24 Atl. 872, sustains, as far as it goes, our conclusion here.

Exceptions overruled.[23]

STATE v. SMITH.

(Supreme Court of Iowa, 1893. 88 Iowa, 178, 55 N. W. 198.)

GIVEN, J.[24] * * * In this case we have the anomaly of a defendant insisting upon the sufficiency of an indictment against himself. Appellant contends that the first indictment returned against him was sufficient, and it was therefore error to discharge the trial jury to resubmit the case to the grand jury, and to put him upon trial a second time. The indictment returned February 24, 1891, charged the crime to have been committed on the 17th day of December, 1891. The time is nowhere else stated. Appellant's counsel contend that this allegation of time is immaterial; that the true time could be proven under the allegation, and therefore the indictment was sufficient. Such was certainly not the view entertained when the motion for a verdict was urged.

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[23] "Another branch of this objection, viz., that the time of committing the offense is not certainly averred, by the words 'on or about,' we consider answered by the remarks already made. The two latter words in this averment have no meaning in this place, and are surplusage." Church, C. J., in Rawson v. State, 19 Conn. 292 (1848). Accord: Under statutes. State v. Hoover, 31 Ark. 676 (1877). But see State v. Baker, 34 Me. 52 (1852); State v. O'Keefe, 41 Vt. 691 (1869).

[24] Part of this case is omitted.

Appellant cites section 4306 of the Code, which provides that no indictment is insufficient "for want of an allegation of the time or place of any material fact, when the time and place have once been stated." The section is inapplicable. This is not an omission to state the time when it had once been stated, but stating an impossible time. He also cites section 4305, which provides that the indictment is sufficient if it can be understood therefrom "that the offense was committed some time prior to the finding of the indictment." It cannot be so understood from this indictment. It states but one date; a date not prior, but subsequent, to the finding of the indictment. If, as in State v. Brooks, 85 Iowa, 366, 52 N. W. 240, a date prior to the finding of the indictment had been once stated therein, the indictment might be held sufficient. State v. Pierre, 39 La. Ann., indexed as page 915, 3 South. 60, is cited. Because of an error in indexing we have been unable to find the case. The index states the point decided as follows: "An immaterial and impossible date in an indictment may be corrected at any time, particularly when the date is not of the essence of the offense charged."

The statement of the date upon which an offense was committed is not an immaterial statement. The date is material, not only as information to the accused, but to show that the crime was committed prior to the finding of the indictment, and within the statute of limitaions. State v. Dominique, 39 La. Ann. 324, 1 South. 665, also cited, is not applicable. In that case an amendment of an information for larceny was allowed under the statute as to the given name of the owner of the stolen property.

In Myers v. Com., 79 Pa. 308, referred to, an indictment was returned in December, 1874, charging the crime to have been committed on the 11th day of October, 1874. Under the statutes of that state the indictment was amended so as to read the 11th day of November. The case is not in point, for the reasons that the date alleged was not an impossible date, and that we have no such statute. No indictment is sufficient that does not state the time at or about which the offense was committed, and, if it states an impossible time, it fails to charge an offense. We are in no doubt but that the first indictment was insufficient. The power of the court to set aside the indictment if insufficient, and to resubmit the case to the grand jury, is not questioned. * * *

Entertaining the views we have expressed, we think the judgment of the district court is fully authorized by law, and it is therefore affirmed.[25]

Kinne, J., took no part.

STATE v. KENNEDY.

(Court of Errors and Appeals of Louisiana, 1845. 8 Rob. 590.)

King, J. * * *[26] The indictment, after stating the mortal blow, with the usual averments of time and place, proceeds: "Of which mortal wound, so given by the said Samuel Kennedy, with the deadly weapons aforesaid, to the said Benjamin Wood Wait, the said Benjamin Wood Wait did then and there suffer and languish, and languishing did live, and a few hours after did die of the said mortal wound."

No principle appears to be better settled than that, in indictments for high offenses, those termed felonies at common law, the averment of time and place is to be repeated to every issuable and triable fact. When these have been once set forth with certainty, they may, in every subsequent averment, be referred to by the words "then and there," which are deemed equivalent to a repetition of the time and place. The time should be stated with such certainty that no doubt can be entertained of the period really intended; and such is the precision required in this respect that any uncertainty in the averment of time and place will vitiate the indictment.

The material facts in murder are the mortal stroke and the consequent death, and the death must appear upon the record to have occurred within a year and day from the time when the mortal stroke was given. The averment, then, of each of these material facts must, under the well-established rules of criminal pleading, be accompanied by an allegation of a certain time and place. Thus, to aver that the assault was made on two days, as on the 1st and 2d of May, or on an impossible day, is such an uncertainty as will vitiate the indictment.

If an indictment for murder state that A., at a given time and place, having a sword in his right hand, did strike B., it is bad, for the time and place relate to the having the sword, and it is not stated when or where the stroke was given.

A., at a certain time and place, made an assault upon B., et eum cum gladio percussit, was held to be bad, because it was not said adtunc et ibidem percussit; the copulative conjunction "and," without the repetition of the time and place to this material ingredient of the offense, being deemed insufficient. In ~~misdemeanors~~ the same strictness ~~is not re~~quired. 1 Chitty, 218, 219; Starkie, Cr. Pl. 58, 62, 65; 2 Hale, 178; Archbold, Cr. Pl. 34; 2 Hawk. c. 23, § 88.

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[25] Compare Vowells v. Commonwealth, 84 Ky. 52 (1886); Conrand v. State, 65 Ark. 559, 47 S. W. 628 (1898); Commonwealth v. Snell, 189 Mass. 12, 75 N. E. 75, 3 L. R. A. (N. S.) 1019 (1905).

[26] Part of this case is omitted. Nicholls, J., dissented.

We will not further multiply instances of this precision, required in the averment of time and place to every material fact in capital crimes. The books are full of them, and no principle is better settled. The decision of the question depends altogether upon authority, and the language of the authors cited, upon this as upon other points, has been used as nearly as possible.

Testing the indictment under consideration by these well-established rules, we find that, although there is a sufficient certainty in setting forth the time and place of the mortal stroke, yet there is no averment of the time and place of the death. The "then and there" immediately precede and refer to the "languished, and languishing did live," and not to the allegation, "and a few hours after did die." The copulative "and," it has been seen, is insufficient to connect the time and place with the death. Nor will the grammatical construction of the sentence support the position, assumed in argument, that the "then and there" refer to the death. The facts of the time and place of death cannot be inferred or ascertained by intendment. They must be precisely and distinctly stated. Nor will the averment in the conclusion of a correct time and place of death cure this defect, but, on the contrary, will render it repugnant to the statement. At the close of the indictment the legal conclusions are to be drawn from the facts previously set forth in the statement. The facts of the time and place of the death not having been set forth in the statement, the legal conclusion cannot be drawn that the deceased was murdered in the parish of Orleans, on the 29th day of December, 1844.

The Attorney General has called our attention to the statute of 1805, which directs that indictments, divested of all unnecessary prolixity, changing what ought to be changed, shall be according to the common law, and contends that the frequent repetitions of time and place constitute some of the prolixities contemplated by the act, of which courts are authorized to divest indictments. We are not prepared to give this construction to the statute. We do not believe that the Legislature intended to confer upon courts authority to legislate upon the subject of criminal proceedings, or the framing of indictments, but merely to direct prosecuting officers to omit those prolixities which were acknowledged to be such at common law, and, consequently, unnecessary, although habitually inserted in indictments; such as the averment that the defendant "not having the fear of God before his eyes," etc., with many other needless to be enumerated, which are found in old precedents, and even in those of more modern date. The changes directed by the act, we think, are those which are necessary to make our proceedings conform to our own laws and form of government; as, for instance, instead of an indictment commencing: "Middlesex, to wit: The jurors of our lord the king"—it should begin: "The State of Louisiana, Parish of Orleans: The grand jurors of the state of Louisiana," with many others of a like nature. If, however, this legislative authority was ever conferred upon courts, it has long since been withdrawn by the Constitution.

Whatever has been determined to be an essential averment in an indictment at common law will be deemed necessary here, unless a statute of the state has removed the reason, and with it the necessity, for the allegation. At common law we have seen that the averment, with certainty, of time and place of the death has been held to be indispensable in indictments for murder, and for sufficient reasons. These reasons have not been removed by our statutes, but exist here in full force; for it is equally true here, as in England, that the death must have occurred within a year and a day from the time when the blow was given to constitute murder, and that the right to a trial by a jury of the vicinage is secured to every citizen.

We find, then, that the indictment wants one of the averments essential to its validity at common law, and that the averment is equally necessary under our laws. The defect is not cured by the verdict, and the judgment must be arrested.

The Attorney General has commented forcibly upon the regrets expressed by learned and able English judges that the great niceties required in framing indictments offered too frequent opportunities for the escape of culprits, the tendency of which was rather the encouragement than the suppression of crime. Lord Hale said that the strictness required had grown to be a blemish and an inconvenience in the law. Similar opinions have since been expressed by Lord Kenyon and Lord Ellenborough. 1 Chitty, 170. But we are not informed that these learned judges ever felt themselves authorized to disregard the law, such as it was, or to dispense with the observance of those niceties, of whose existence they complained. Their remarks apply with full force to the criminal laws of this state; but the power to remedy the evil resides in the legislative branch of the government, and it is to be regretted that it has not already been exercised.

The English Parliament, attentive to the suggestions of its courts, has provided remedies for many of the inconveniences of the common law. The act, however, has been passed since 1805, and has no force in this state. Archbold, Stat. Geo. IV.

It is therefore ordered that the judgment of the inferior court be reversed, that the verdict in the case be set aside, and the judgment thereon arrested.

III. Description of Persons Connected with the Offense

MEMORANDUM.

(Court of King's Bench, 1496. 3 Dyer, 285a.)

That in Trin. Term, in the twelfth year of Hen. VII, in B. R. a man was indicted for a trespass, assault, and battery upon one John. parish priest of D. in the county of C. without any sirname of the priest. And an exception taken to it by Segewick for the uncertainty; and also for that the party might be punished twice for the same trespass, if hereafter he be indicted afresh, and the entire name of the priest put into the indictment, wherefore, &c. But Fineux and Rede thought the indictment good, and the name of the priest not material; for it if had been, upon a certain person unknown, it had been well enough, as of robbery or murder committed on a person unknown. And if he be hereafter indicted for the same trespass or felony wherein the true name of the party unknown is comprized, yet he may aid himself by an averment that they were one and the same trespass or felony, and not divers, although they were supposed at divers times.

REX v. ————.

(Court for Crown Cases Reserved, 1822. Russ. & R. 489.)

The prisoner was indicted at the Old Bailey sessions in January, 1822, by the description of a person, whose name was to the jurors unknown. The offense with which he was charged was that of publishing a blasphemous and seditious libel.

It appeared that, when apprehended, he refused to declare his name before the magistrate, and the prosecutors, not being able to discover his name, indicted him as a man whose name was unknown to the jurors. When called to the bar, the indictment was read to him, and he then refused to plead, and was remanded. At the following sessions, in the month of February, the prisoner was again called to the bar, and by the advice of his counsel put in a demurrer in writing to the indictment. The prosecutors had time given them, until the next morning, to reply; but, before they could do so, the prisoner by his counsel moved the court to be permitted to withdraw his demurrer, which was granted; and being then called on for his plea, he pleaded not guilty; and, being told that he must plead by some name, he refused to give in any name. The learned recorder was of opinion that his plea could not be received without a name, and the prisoner was again remanded for want of a plea. At the following sessions he was again called on to plead, and again pleaded not guilty, but refused to put in that plea by any name. He was again told that the court could not receive his plea, unless he would plead by some name; and, as he persevered in his refusal, he was again remanded.

As this case appeared to be without precedent and might materially affect the administration of justice, the learned recorder requested the opinion of the judges upon the following points: First, whether the prisoner could be admitted to put a plea on the record without a name; secondly, whether such a plea should be treated as a mere nullity, and the prisoner be remanded from time to time, as in contempt for not pleading; thirdly, whether the refusal to plead by name would entitle the court to enter up judgment by default; and, fourthly, whether in case the prisoner should ultimately plead by name, the court could proceed to try him upon this indictment or should quash the indictment as defective, and direct a fresh indictment to be preferred against him by the name by which he might plead.

In Trinity term, 1822, this case being presented for consideration, some of the learned judges, before whom it was discussed, suggested that the prisoner might be indicted as a person whose name was unknown, but who was personally brought before the jurors by the keeper of the prison. An indictment was preferred accordingly, and the prisoner was convicted.

BARNESCIOTTA v. PEOPLE.

(Supreme Court of New York, 1877. 10 Hun. 137.)

Davis, P. J.[28] The plaintiffs in error were indicted for keeping a disorderly house. The plaintiff in error John Barnesciotta was named in the indictment by that name, followed by the words, "otherwise called Garibaldi." On being arraigned, his counsel read and filed the following plea:

"Now comes the defendant, John Barnesciotta, and pleads to the indictment, that he is not now, and never was, known by the name of Garibaldi, which he verifies. John Barnesciotta.

"Sworn this 25th day of September, 1876.

"Wm. F. Howe, Commissioner of Deeds, N. Y."

The district attorney filed a demurrer to said plea, and the said plaintiff in error joined in demurrer. The court overruled the demurrer, and gave judgment thereon for the people. The demurrer was properly overruled. The true name preceded the alias dictus, and in such a case a plea in abatement will not be sustained. Reid v. Lord, 4 Johns. 118. It was quite immaterial whether the plaintiff in error was ever known by the name of Garibaldi, and the indictment did not so aver. If his true name be John Barnesciotta, as the plea in abatement must be taken to admit, then the alias dictus becomes wholly immaterial, and is not capable of working prejudice to the plaintiff in error.

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[28] Part of this case is omitted.

Besides, the plea was defective in form. It does not aver the true name except argumentatively, and does not aver that he is not indicted by his true name; and it does not meet the averment of the indictment, which is not that the defendant was known by the name of "Garibaldi," but that "John Barnesciotta" was otherwise called "Garibaldi," which may be, and probably was, a nickname by which he was sometimes called by his associates. There is no reason for interference with the conviction or judgment on this ground. The demurrer was a proper mode of disposing of the plea on the record. Rex v. Clark alias Jones, 1 D. & R. 43. * * *

Judgment and conviction affirmed.

REX v. NEWMAN.

(Court of King's Bench, 1690. 1 Ld. Raym. 562.)

The defendant was indicted by the name of Elizabeth Newman alias Judith Hancock, for keeping a bawdy house. Mr. King moved to quash it, because a woman cannot have two Christian names; for which reason in a case in Noy the return of a rescous was quashed. And for this reason the indictment was quashed. * * * [29]

COMMONWEALTH v. BUCKLEY.

(Supreme Judicial Court of Massachusetts, Plymouth, 1887. 145 Mass. 181, 13 N. E. 368.)

Exceptions from superior court, Plymouth county; Thompson, Judge.

Indictment charging that the defendants, on a certain day, to wit, at Brockton, on May 14, 1887, "knowingly, willfully, and maliciously did verbally threaten to accuse one Frank E. White, of Brockton, aforesaid, of having committed the crime of burning a building not his own, to wit, the store of John D. White, by words then and there knowingly, willfully, and maliciously spoken of and to the said Frank E. White, substantially as follows: 'You [meaning the said Frank E. White] are the man that set the fire, and, unless you give us one hundred dollars, we will make it hot for you. We will make a jail bird of you'—with intent then and there to extort money, to wit, the sum of one hundred dollars, from him, the said Frank E. White, against the peace," etc. At the trial in the superior court, it was proved, but the attention of the court was not called to the fact until after the commencement of the charge, that the name of the person referred to and designated in said indictment as Frank E. White was Frank A. White, and not Frank E. White, and there was no evidence tending to show that said Frank A. White had ever been known or called Frank E. White, until so designated in the indictment; and thereupon the defendants asked the court to rule that there was a variance between the allegations in said indictment and the proof, and that, by reason of said variance, the jury should return a verdict of not guilty. The court refused to so rule. * * * [30]

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[29] Part of this case is omitted.

HOLMES, J. The name of the person threatened is necessary to the identity of the offense charged in the indictment, and therefore must be proved as set forth. Com. v. Mehan, 11 Gray, 321. It is settled in this commonwealth ~~that a middle name or initial~~ is part of the name, and a variance in regard ~~to it is~~ fatal. Com. v. Perkins, 1 Pick. 388; Com. v. Hall, 3 Pick. 262; Com. v. Shearman, 11 Cush. 546. The ruling that there was no variance if Frank A. White was the person called Frank E. White in the indictment, probably went upon the ground that the E. might be rejected as surplusage, as is held in some states.[31] It cannot be said as matter of law that A. and E. are the same. There was no evidence that the party was ever called Frank E. White.

Exceptions sustained.[32]

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[30] Part of the statement of facts is omitted.

[31] See State v. Manning, 14 Tex. 402 (1855); O'Connor v. State, 97 Ind. 104 (1884); People v. Cook, 14 Barb. (N. Y.) 259 (1852). It is held in some states that it is not necessary to insert the middle name or initial; but, if inserted, it must be correctly stated. Price v. State, 19 Ohio, 423 (1850); State v. Hughes, 1 Swan (Tenn.) 261 (1851).

[32] Accord: Reg. v. James, 2 Cox, C. C. 227 (1847). Cf. Rex v. ———, 6 Car. & P. 408 (1834).

The terms junior and senior are no part of the name, and the omission or insertion of either does not render the indictment defective. Rex v. Peace, 3 B. & Ald. 579 (1820); People v. Collins, 7 Johns. (N. Y.) 549 (1811). At least where it does not appear that there are two persons of the name, or that the party was misled. San Francisco v. Randall, 54 Cal. 408 (1880).

A person may be described either by his baptismal name or by a name by which he is commonly known. Wilson v. State, 69 Ga. 224 (1882); Alexander v. Commonwealth, 105 Pa. 1 (1884).

INITIALS.—Some of the earlier cases hold that an indictment is defective if, instead of stating the Christian name in full, it describes a person by the initials of his Christian names. Gardner v. State, 4 Ind. 632 (1853), and see Smith v. State, 8 Ohio, 294 (1838).

Later cases hold that, if he is known by his initials, his name need not be more fully stated. State v. McMillan, 68 N. C. 440 (1873); State v. Appleton, 70 Kan. 217, 78 Pac. 445 (1904). Others that the initials are sufficient in all cases. Eaves v. State, 113 Ga. 749, 39 S. E. 318 (1901).

The defendant must object by a plea in abatement, in which he states his true name, when the indictment states his name incorrectly. Smith v. State, 8 Ohio, 294 (1838); State v. Brunell, 29 Wis. 435 (1872); Verberg v. State, 137 Ala. 73, 34 South. 848, 97 Am. St. Rep. 17 (1902). The misstatement of the name of a third person, when the name of such person is material, is a fatal variance (Collins v. State, 43 Tex. 577 [1875]), unless it is shown that the person was also known by the name alleged, in which case the question of variance is for the jury (Commonwealth v. Warren, 167 Mass. 53 [1896]), and may be taken advantage of by motion to quash or demurrer. But such misnomer is cured by verdict. State v. Rook, 42 Kan. 419, 22 Pac. 626 (1889); State v. McMillan, 68 N. C. 440 (1873); State v. Rudolph, 3 Hill, Law (S. C.) 257 (1837).

REGINA v. BISS.

(Court for Crown Cases Reserved, 1839. 2 Moody, 93.)

The prisoner was tried and convicted before Lord Abinger, at the Essex Lent assizes, 1839.

That she on the 15th of August, at the parish of Lutton, in the county of Essex, on an infant male child aged about six weeks, and not baptized, feloniously, willfully, and of her malice aforethought, did make an assault, and that she with her hands feloniously, etc., did force, cast, and throw said male child into a pond of water there, by means whereof said male child in, by, and with the waters of said pond was then and there choked, suffocated, and drowned, of which said choking, suffocating, and drowning said male child died; and that she the said male child, in manner and form aforesaid, feloniously, willfully, and of her malice aforethought did kill and murder.

An objection was made by Mr. Dowling, the prisoner's counsel, that the indictment neither stated the name of the child, nor that the name was unknown to the jurors.

The question reserved was whether that were a good objection.

The case was considered by all the judges except VAUGHAN, J., GURNEY, B., WILLIAMS, J., and ERSKINE, J., in Easter term, 1839, and they all thought the objection good, and that the judgment ought to be arrested.[33]

REX v. FOSTER.

(Court for Crown Cases Reserved. 1820. Russ. & R. 412.)

The prisoner was tried before Mr. Baron Garrow at the Maidstone Lent assizes in the year 1820, for committing an unnatural crime on one John Whyneard.

The person on whom this crime was convicted, being called as a witness, said that his name was spelt Winyard, but it was pronounced Winnyard.

The prisoner was convicted, and received sentence of death, but execution was respited, in order that the opinion of the judges might be taken on the objection that the name of the witness was misspelt.

In Easter term, 1820, the judges took this case into consideration, and held the conviction right.

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[33] Compare Reg. v. Hogg, 2 Moo. & R. 380 (1841); Reg. v. Willis, 1 Den. C. C. 80 (1845).

REGINA v. DAVIS.

(Court for Crown Cases Reserved, 1851. 2 Den. Cr. Cas. 231.)

Upon the trial for a felony of William Davis, at the Quarter Sessions held at Dorchester on the 31st of December, A. D. 1850, it appeared that the property alleged to be stolen was stated in both counts of the indictment (a copy of which is hereunto annexed as part of the case) to be the property of Darius Christopher. A person of the name of Christopher, the prosecutor of the charge, was called as a witness, and, on being asked what was his Christian name, said it was "Trius." It was then objected by the prisoner's counsel that the property had been laid in the wrong person. It was answered that the rule of law as to idem sonans was applicable; and that Trius and Darius, when pronounced, sounded as the same words. And of this opinion was the court, and overruled the objection. The trial then proceeded, and the prisoner was found guilty on the second count. The court did not pass sentence, but reserved the question above mooted for the opinion of this court. The prisoner was discharged on recognizance of bail to appear and receive judgment at the next Quarter Sessions in April. The question for the court is: Are the words "Trius" and "Darius" pronounced so as to produce the same sound? If so, the conviction is to stand; if not, the prisoner is to be entitled to an acquittal.

The following addition was made to the above case by the Chairman of the Quarter Sessions:

This case having been sent back for the Chairman of Sessions to state whether it was left to the jury to decide "if the two names sound alike, so as to designate the prosecutor and no one else, thereby distinguishing him from all others, I beg to state, that on my laying down the rule as to names being idem sonantia, and the court being of opinion that the names Darius (as pronounced in the Dorset dialect D'rius) and Trius sounded alike, the case proceeded, without its being either expressly or substantially left to the jury to decide as to the question of the names sounding alike; but the jury found their verdict on the facts of the case, and the motion of counsel was in arrest of judgment."

On Saturday, 26th April, 1851, this case (which had been shortly argued by Ffookes on behalf of the prisoner on the 8th of January) was considered by the judges; and THE COURT held that the conviction must be quashed, as the Chairman had not treated the question respecting the similarity of sound of the two names as a question of fact for the jury, but as one of law which it was for him to determine; and this court could not affirm as a matter of law that the two names sounded alike.[34]

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[34] See, also, Commonwealth v. Warren, 143 Mass. 568, 10 N. E. 178 (1887).

ANONYMOUS.

(Court of King's Bench, 1679. 1 Vent. 338.)

An indictment was quashed for want of addition. For the court said, no process ought to go out thereupon, because the party cannot be outlawed.

ANONYMOUS.

(Court of King's Bench, 1469. Year Book 9 Edw. IV, 48.)

In the King's Bench a man was indicted by this name J. S. servant of J. N. alias dicti Johan. Huntley of Dale, in the county of Middlesex, Bocher, and because there was not a sufficient addition, for servant is not an addition, and this word Bocher should be referred to the next person precedent, S. J. Huntley, &c. The defendant was dismissed.

FUSSE'S CASE.

(Court of Queen's Bench, 1597. Cro. Eliz. 583.)

An indictment was against him by the name of John Fuss, of Aldrington, alias dictus John Fust, of Aldrington, yeoman, quod felonice et burglariter fregit domum, &c. And because there wanted the addition of yeoman in the first name, which was not till after the alias dictus, it was ruled to be ill. As also, for that he did not say noctanter, the indictment of burglary was not good. Gawdy said, it was good for the felony. But for the first cause he was discharged. And it was said, that there were divers precedents in this court accordingly.

STATE v. McDOWELL.

(Supreme Court of Indiana, 1841. 6 Blackf. 49.)

Dewey, J. This was a prosecution against a justice of the peace for oppression under color of his office. The circuit court quashed the indictment on the motion of the defendant.

The objection urged against the indictment is that the defendant is not described by the addition of his degree, or mystery, and place of residence.

By the common law no addition was required in indictments against persons under the degree of a knight. 1 Chitt. C. L. 204. The statute of additions, 1 Hen. V, c. 5, enacts that defendants shall be described by adding to their names their estate, degree, or mystery, and place of residence, in all cases in which "the exigent shall be awarded."

It has been held, in the construction of this statute, that in prosecutions which cannot be attended by the ~~process~~ of outlawry, the indictment need not give the addition of the defendant. 1 Chitt. Cr. L. 206; Bac. Abr. Indictment, 2; Id. Misnomer, 2; Rex v. Brough, 1 Wils. 244; Cro. Eliz. 148. The exigent, being a step in the proceedings of outlawry, is unknown to our law.

It is, therefore, ~~evident that the~~ statute of additions, from its own terms, is not applicable to ~~prosecutions in~~ this state; and it is equally clear that the common law does not require the defendant to be described by his addition in ~~our~~ indictments.

The circuit court erred in quashing the indictment.[35]

IV. Description, Ownership, and Value of Property

The certainte of the name of the person to whom the offense is done, is also in most cases requisit. But yet if the endictment be quod bona et catalla cuiusdam hominis ignoti felonice cepit, or quendam ignotum felonice depredavit, it is good, because of the King's advantage of forfeiture thereby. Fitz. Endictment, 12.

You may see an endictment (Fitz. Endict. 9) quod A. verberavit, et XX Jaccos prety &c. was thought sufficient without showing to whom the Jackes did belong: whereat, M. Stanford (fol. 95) marvelleth, saying that hee saw no cause why it should be good, unless it were for that the matter could not bee made more certaine. But peradventure certaintie in endictments, was not in those daies thought so needful as now it is holden. * * *

If the endictment be, quod A. verberavit B. and unum equum precy XX. s. felonice cepit, and doth not say, ipsius B. yet it is good enough. 30 H. 6, Fitz. Endict. 9. But if it be qd. unum equum prædict' J. cepit, and there were no mention of J. before, then it is void. 9 E. 4, 1.

If the goods of a man be taken and he maketh executors, and dyeth, the endictment shall be bona testatorius; but if they were taken after his death, it shall be bona testatoris in custodia executorum existentia:[36] if the indictment be quod A. furatus est tunicam hominis ignoti quem invenit mortuum, that is not good. 11 R. 2, Fitz. Endict.

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[35] The statute of additions has been held to be in force in a few states. See 1 Bish. New. Cr. Prac. § 674. Act 14 & 15 Vict. c. 100, § 24, abolished the necessity for the addition.

Where the addition of defendant's degree, mystery, and residence is necessary, the omission is cured by pleading to the indictment. Rex v. Hannam, 1 Leach. C. C. 420 (1787). And a fortiori by verdict. Commonwealth v. Jackson, 1 Grant, Cas. (Pa.) 262 (1855).

[36] "Or it may be general bona ipsius A"—the executor. 2 Hale, P. C. 181. See, also, U. S. v. Mason, 2 Cranch, C. C. 410, Fed. Cas. No. 15,728 (1823); Crockett v. State, 5 Tex. App. 526 (1879). "A hog, the property of a married woman, living with her husband, who has possession of it, is not incorrectly described in the indictment for stealing it as the property of the husband." Manning, J., in Lavender v. State, 60 Ala. 60 (1877).

15. * * * If my goods be taken by a trespassour and an other taketh them from him, the endictment shall be bona of him which had the last possession.[37] But if I baile goods to one, from whom they be robbed, then it shall be bona of me in his keeping, Marr.[38] * * * If an endictment be, bona capellæ in custodia &c. or bona domus, or Ecclesiæ tempore vacationis, it is good. 7 E. 4, 14.[39]

The name (and value) of the thing in which the offence is committed, ought also to be comprised in the endictment: for an endictment of the taking bona et catalla, whether it be in trespas or felonie, is not good, for the uncertaintie what goods they be: and if it be of dead things, it may be bona et catalla, expressing the names thereof in certaintie; but if it be of things living, it shall not say, bona et catalla, but equum, bovem, ovem, &c.

Again the value (or price) of the thing is commonly to be declared in felonie, to make it appeare from petite larceny. * * * In all cases (saith M. Marr.) where the number ought to be expressed in the endictment, there also it must be said, prety, or ad valentiam: * * * Where it is of a live thing or things, it must be prety: and so of a dead thing in the singular number: but if it be of dead things in the plural number, then it must be ad valentiam, and not prety.[40] Againe if it be of a dead thing that goeth by weight or measure, the forme is to say prety and not ad valentiam.

If the endictment be of taking away coine which is not current, it shall say prety: otherwise if it is of money current, because that carrieth his value and price with it. If it be quod proditore fecit grossos, vel denarios, it shall be ad valentiam, and it shall not say, 20 libras in denarys, or in pecunia domini regis, but ad instar pecuniæ domini regis. Sundry other daintie and nice differences doth M. Marr. make. Lambard's Eirenarcha, 496.

REX v. KETTLE.

(Chelmsford Assizes, 1819. 3 Chit. Cr. Law [4th Ed.] 947a.)

The prisoner was indicted for stealing "one bushel of oats, one bushel of chaff, and one bushel of beans, of the goods and chattels of A. B., then and there found," and the proof was that these articles, at the time of the felonious taking, were mixed together. BAYLEY, J., held that the articles ought to have been described as mixed, thus: "A certain mixture, consisting of one bushel," etc., and he directed an acquittal on this account.[41]

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[37] Accord: King v. State, 43 Tex. 351 (1875); Ward v. People, 3 Hill (N. Y.) 395 (1843).

[38] Or the ownership may be laid in the owner, or in the bailee. Kennedy v. State, 31 Fla. 428, 12 South. 858 (1893). Unless the owner be the thief, in which case the ownership should be laid in the bailee. Adams v. State, 45 N. J. Law, 448 (1883).

[39] See further, 25 Cyc. 96.

[40] "But this I take to be but clerkship, and not substantial." 2 Hale, P. C. 183.

REX v. FORSYTH.

(Court for Crown Cases Reserved, 1814. Russ. & R. 274.)

The prisoner was tried before Mr. Justice Dallas, at the Lent assizes for the county of Stafford, in the year 1814, on an indictment, the first count of which stated, that the prisoner * * * became bankrupt, and on 28th of same November, upon the petition of the before named persons, a commission of bankruptcy was issued, and that on 30th of same November, at Manchester, prisoner was declared a bankrupt, and notice thereof left at the dwelling house of prisoner, at Burslem aforesaid, * * * and that he, devising to cheat his creditors, did not at any of the said times, upon such his examination, truly disclose and discover all his estates and effects, as was his duty so to do, but, on the contrary thereof, then and there did conceal and kept secret a bed, six tables, etc. (enumerating many articles), and "one hundred other articles of household furniture, and a certain debt due from one John Taylor to the said prisoner to the value of twenty pounds and upwards."[42] * * *

The following objections were then taken to the indictment: * * *

Thirdly. That the household furniture, as well as the debt concealed, etc., were not stated in the indictment with sufficient certainty, the former being, "and one hundred other articles of household furniture," and the latter, "a certain debt due from one A. B. to the said prisoner." * * *

In Easter term, 7th May, 1814, all the judges met (except Dampier, J., who was absent) and held the indictment bad, on the ground of the property concealed not being all specified, and no distinct value having been put upon the articles enumerated. * * *[43]

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[41] "I doubt the propriety of that decision [Rex v. Kettle]. I cannot help thinking that, if a man steal wine and water, he may be charged with stealing wine. The above principle would doubtless hold good, where the mixture was such as to produce a chemical change in the articles." Alderson, B., in Reg. v. Bond, 4 Cox, C. C. 234 (1850).

[42] Part of this case is omitted.

[43] "Upon an indictment for stealing printed books, as it has been observed by my Lord, it is not necessary to do more than to name so many printed books." Bayley, J., in Rex v. Johnson, 3 Maule & S. 555 (1815).

"An averment that the defendant conveyed a certain parcel of land in the city of Salem, without any other terms of description, is bad for uncertainty. * * * The defendant may have owned other parcels of land in the city of Salem, which he conveyed to the prosecutor on the day alleged." Bigelow, J., in Commonwealth v. Brown, 15 Gray (Mass.) 190 (1860). See, also, State v. Malloy, 34 N. J. Law, 410 (1871).

STATE v. BASSETT.

(Supreme Court of Louisiana, 1882. 34 La. Ann. 1108.)

BERMUDEZ, C. J.[45] The defendant was convicted of larceny and sentenced to hard labor.

On appeal he complains, as he did in the lower court: * * * That he could not be convicted of stealing hens, when the charge was of stealing chickens, and that it was not proved that the chickens were Cochin China, but Buff Cochin chickens. * * *

The district judge has well answered all the objections urged by the defendant. He says: "The description of the stolen property is two Cochin China chickens, of the value of," etc.

In 2 Bishop's Cr. Pr. § 700, it is held that such description of the thing stolen as the following is good and sufficient, viz.: "One sheep," "a horse," "a certain mare," "one cow," "one watch," "one certain hog." In State v. Carter, 33 La. Ann. 1214, where the description was "one hog," it was held to be good, and a number of authorities cited in support. See, also, State v. Everage, 33 La. Ann. 122; State v. King, 31 La. Ann. 179.

In State v. Thomas, 30 La. Ann. 600, the property was described as "one small hog." It was urged that indictment was insufficient, in not describing the animal by any mark, or by its color and sex. So, in the case at bar, it was urged that the color, condition and sex of the chickens ought to have been alleged. But if the description, such as "one hog," is sufficient, without mention of the color, sex, condition, flesh marks, or ear marks, as was held in State v. Carter, 33 La. Ann. 1214, what reason exists for a more particular description when chickens are the subject of larceny? Chickens are designated according to sex and age, as chicks, pullets, cockrills, hens and roosters. Hogs are also known as pigs, shoats, barrows, sows and boars. If an indictment charging the larceny of "one hog," or of "one small hog," is sustained by proof that the property stolen was either a boar, a barrow, a sow, certainly an indictment charging the larceny of a chicken is good, and evidence is admissible, whether the chickens stolen were hens, roosters or pullets.

The state is bound to allege and prove every fact or ingredient necessary to constitute the crime charged. The converse must be equally true. If it is unnecessary to aver the color, marks or sex of a hog or chicken charged to have been stolen, then it is unnecessary to prove either of those facts. * * *

Judgment affirmed.[46]

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[45] Part of this case is omitted.

[46] See, also, State v. Stelly, 48 La. Ann. 1478, 21 South. 89 (1896).

In Rex v. Douglass, 1 Camp. 212 (1808), Lord Ellenborough was of opinion that where a statute enumerated several articles, as baskets and parcels, an indictment under the statute must describe the article by its specific, not its generic, name. This doctrine was followed in Rex v. Loom, 1 Moody, C. C.

PEOPLE v. BOGART.

(Supreme Court of California, 1868. 36 Cal. 245.)

The indictment charged the defendant with having stolen sundry gold coins, lawful money of the United States, of the aggregate value of three hundred and fifty dollars, and averred that the grand jury could not give a more particular description, as they had no means of knowledge. It also charged that the gold coins were the property of "Wells, Fargo & Co.," without giving the names of the firm, or averring that "Wells, Fargo & Co." was a partnership or a corporation. * * *

Sanderson, J.[47] The general rule undoubtedly is that the stolen property, if money, should be described as so many pieces of current gold or silver coin, specifying the species of coin; but, if the species of coin be unknown to the grand jury, they may so state, in lieu of such specification. In this respect the law does not require greater certainty than the nature of the case affords.[48] * * *

In another respect, however, the indictment is bad. The ownership of the money is laid in "Wells, Fargo & Co.," without any specification of the copartners, if it is a partnership, or any allegation that "Wells, Fargo & Co." is a corporation, if such is the case. At common law, if the stolen goods are the property of partners, or joint owners, the names of all the partners, or joint owners, must be stated. Commonwealth v. Trimmer, 1 Mass. 476; Hogg v. State, 3 Blackf. (Ind.) 326; State v. Owens, 10 Rich. Law (S. C.) 169. To avoid this difficulty, the statute of 7 Geo. IV, c. 64, § 14, was passed, which provided that where the stolen goods were the property of partners, joint tenants, parceners, or tenants in common, it should be sufficient to charge the property in one of them by name, and another or others, according to the fact; but we have no such statute in this state. Hence, if "Wells, Fargo & Co." is the name or style of a firm or copartnership, the names of the several persons who compose the firm should have been stated. If, however, "Wells, Fargo & Co." is the name of a corporation, the indictment would have been good, had it contained an allegation to that effect. 2 Russ. on Crimes, 99; People v. Schwartz, 32 Cal. 160. * * *

Judgment reversed, and cause remanded for further proceedings, and remittur directed to issue forthwith.

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160 (1827), where it was held that an indictment for stealing sheep would not support a conviction for stealing lambs, and in Rex v. Puddifoot, 1 Moody, C. C. 247 (1829), where it was held that on a similar indictment one could not be convicted of stealing a ewe. These cases, and similar cases, seem to be overruled by Reg. v. Spicer, 1 Den. C. C. 82 (1845).

[47] Part of this case is omitted.

[48] Compare Reg. v. Bond, 1 Den. C. C. 517 (1849). In many jurisdictions it is held to be unnecessary to state the species, number, or denominations of the money stolen. Commonwealth v. Stebbins, 8 Gray (Mass.) 492 (1857); State v. Palmer, 20 Wash. 207, 54 Pac. 1121 (1898), by statute.

V. AVERMENT OF WORDS AND WRITINGS

LLOYD'S CASE.

(Court for Crown Cases Reserved, 1767. 2 East, P. C. 1122.)

In Lloyd's case, who was tried by Mr. Justice Yates, the indictment only followed the words of the Black Act (9 Geo. I, c. 22), and charged that the prisoner "knowingly, unlawfully, wickedly and feloniously, did send a certain letter in writing, without any name subscribed and signed thereto, directed to one Edward Salway, by the name of Edward Salway, Esq., ~~demanding~~ money, to wit, 100 guineas, etc., to the great damage of the said E. S. and against the form of the statute," etc. After conviction, it was moved in arrest of judgment, that the indictment was bad in two respects.[49] * * * Secondly. Because neither the letter nor even the substance of it was set forth in the indictment~~. The learned judge, in~~ reporting the case afterwards to the rest of the judges, observed: The second objection seemed to him a very strong one; and therefore he respited judgment for the opinion of the judges upon it. It was argued for the prosecutor that this indictment pursued the very words of the statute 9 Geo. I, c. 22, which in general cases was holden to be sufficient. That the defendant was charged with sending this letter "feloniously and contrary to the form of the statute," and that those words import that the letter was of such a nature as the statute had in view. That the jury had found the defendant guilty to the whole extent of that charge, and therefore it must be taken that the letter which was proved to the jury, and upon which their verdict was founded, was a menacing letter, and within the true meaning of the statute. That if it were not such a letter it was to be presumed that the prisoner would have been acquitted, as all these trials were superintended by a judge who must be supposed to give proper directions to the jury. In answer, it was admitted that in general cases, if an indictment on a statute pursued the words of the statute itself, it was sufficient; but those were cases where the words of the statute contained a complete description of the offense. But when the statute related to a particular kind of letter, the indictment should state the letter itself, that the court might see whether it were one of that kind. That in every indictment a complete offense must be shown, so as to enable the court to give judgment upon it in case a demurrer were joined or a writ of error brought. But if the words "feloniously" and "contrary to the statute" should be deemed sufficient, it would leave the construction of the law to the jury. That in all indictments of forgery the instrument forged must be set forth, that the court might see that it was one of that kind which fell within the purview of the statute.[50] Mr. Justice Yates further stated, that he had since caused inquiries to be made into the practice of the Old Bailey, and upon the Western and Home circuits, and found that in all indictments upon this act of Parliament the letter itself was generally set forth. And that the clerks did not remember an instance where the indictment did not state at least the substance of the letter. In Trinity term following the judges were consulted on this case; and they were of opinion that the indictment was bad in not setting forth the letter itself. For if the words "feloniously and contrary to the form of the statute" were allowed to supply the place of the letter, it would be leaving it to the prosecutor to put his own interpretation upon it, and to the jury the construction of the matter of law.[51]

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[49] Part of this case is omitted.

REGINA v. DRAKE.

(Court of Queen's Bench, 1706. 2 Salk. 661.)

Information for that the defendant, being evilly disposed to the government, did make a libel, in which libel were contained divers scandalous matters secundum tenorem sequent., and in setting out a sentence of the libel, it was recited with the word nor instead of not; but note, the sense was not altered thereby. The defendant pleaded not guilty; and this appeared upon evidence, a special verdict was found.

Et Per Curiam. 1st. Cujus quidem tenor imports a true copy. Vide Reg. 169; 8 Co. 78; Co. Ent. 508; 2 Saund. 121, in hac quæ sequitur forma; 5 Co. 53, tenor is a transcript, and implies the very same.

2dly. They held that this was not a tenor, by reason of this variance; for not and nor are different—different in grammar and different in sense. And POWYS, J., held as to the point where literal omissions, etc., would be fatal, that where a letter omitted or changed makes another word, it is a fatal variance; otherwise where the word continues the same. And in the principal case, no man would swear this to be a true copy.[52]

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[50] Accord: Perjury. Rex v. Beach, 1 Cowp. 229 (1774). Libel. State v. Jay, 34 N. J. Law, 368 (1871).

[51] "It is undoubtedly a rule that an indictment for any offense must show that the offense has been committed, and must show how it has been committed. * * * In some instances, words are the subject-matter of an indictment; and it follows from this principle, which I have mentioned, that whenever the offense consists of words written or spoken, those words must be stated in the indictment." Bramwell, L. J., in Bradlaugh v. Reg., 3 Q. B. D. 615, 616 (1878).

"There are cases which will form just and necessary exceptions to this rule; as where the forged instrument has been destroyed by the prisoner, or has remained in his possession, and perhaps in other cases, where the instrument cannot be produced, and there are no laches on the part of the government or prosecutor. But in every such instance, that the exception may be admitted, it must appear in the indictment what is the cause of the nondescription of the instrument." Sedgwick, J., in Commonwealth v. Houghton, 8 Mass. 110 (1811).

"If the paper is of a character to offend decency, and outrage modesty, it need not be so spread upon the record as to produce that effect." Redfield, C. J., in State v. Brown, 27 Vt. 620 (1855).

STATE v. MARLIER.

(Kansas City Court of Appeals, Missouri, 1891. 46 Mo. App. 233.)

ELLISON, J. This is a prosecution by indictment for slander, under section 3868, Rev. St. 1889.[53] * * *

The defendants are Belgians, and it appears that the words were spoken in the French language in the presence and hearing of Belgians. The cause was tried by the aid of an interpreter. The indictment sets out the words in the English language, and omits to set them out in the language in which they were uttered. ~~This was wrong~~. The words should be charged as spoken, and in the tongue spoken. They should then be followed ~~by a proper~~ translation. Zennobis v. Axtel, 6 T. R. 162; Wormoth v. Cramer, 3 Wend. 394; Kerschbaugher v. Slusser, 12 Ind. 453; Hickley v. Grosjean, 6 Blackf. (Ind.) 351; Odger's Libel & Slan. 109, 110, 470; Newell on Defamation, Slander & Libel, 277, 637. And in this respect there is no difference between a civil and criminal prosecution. Cook v. Cox, 3 M. & S. 110. The motion in arrest should have been sustained. We will, therefore, reverse the judgment and discharge defendants. All concur.[54]

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[52] Cf. Commonwealth v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475 (1822); Rex v. Wright, 1 Lewin, 236 (1828).

[53] Part of this case is omitted.

[54] See, also, Rex v. Goldstern, Russ. & Ry. 473 (1822); People v. Ah Sum, 92 Cal. 648, 28 Pac. 680 (1892).

"The recital of the instrument is usually prefaced by the words 'to the tenor following, that is to say,' or 'in the words and figures following,' which imports an exact copy. But it has been holden that the words 'as follows' are sufficient; that they intend the same, and profess the same exactness." Chitty Cr. L. vol. 3, 1040.

The statute of 23 Geo. II, c. 11, made it ~~unnecessary in indictments~~ for perjury to set out the false statement according to ~~its tenor~~. See Bradlaugh v. Reg., 3 Q. B. D. 617 (1887). Similar statutes have been enacted in the United States. U. S. v. Walsh (C. C.) 22 Fed. 644 (1884); State v. Groves, 44 N. C. 402 (1853). A common statute in the United States likewise abolishes the common-law rule requiring, in indictments for forgery, that the writing be set out verbatim. State v. Childers, 32 Or. 119, 49 Pac. 801 (1897); Bostick v. State, 34 Ala. 266 (1859); State v. Pullens, 81 Mo. 387 (1884).

VI. Averment of the Degree of Defendant's Connection with the Offense

BANSON v. OSSLEY.

(Court of King's Bench, 1686–87. 3 Mod. 121.)

An appeal ~~of~~ murder was tried in Cambridgeshire against three persons, and the count was, that Ossley assaulted the husband of the appellant and wounded him, in Huntingdonshire, of which wound he languished and died in Cambridgeshire, and that Lippon and Martin were assisting.

The jury found a special verdict, in which the fact appeared to be, that Lippon gave the wound, and that Martin and Ossley were assisting.

The first exception to this verdict was: That the count and the matter therein alleged must be certain, and so likewise must the verdict, otherwise no judgment can be given; but here the verdict finding that another person gave the stroke, and not that person against whom the appellant had declared, it is directly against her own showing.[55]

* * *

The Court answered ~~to the first exception, that it was~~ of no force, and that the same objection may be made to an indictment, where in an indictment if one gives the stroke and another is abetting, they are both principally and equally guilty; and an indictment ought to be as certain as a count in an appeal. * * *

HATCHETT v. COMMONWEALTH.

(Court of Appeals of Virginia, 1882. 75 Va. 925.)

Anderson, J., delivered the opinion of the court.[55]

The prisoner, Littleton Hatchett, was indicted jointly with Oliver Hatchett and Henry Carroll; Oliver Hatchett for the willful and malicious murder of Moses Young by poison, Henry Carroll and Littleton Hatchett, the prisoner, as accessories before the fact. It is stated in the petition that Carroll has been tried and acquitted. Oliver, who is charged as principal, had not been tried, but was still under arrest.

The court is of opinion that the evidence is insufficient to connect Oliver Hatchett, who is charged as principal with the perpetration of this crime, to warrant the conviction of the prisoner as an accessory before the fact.

At common law the accessory could not be tried until the principal had been convicted by the verdict of a jury (or outlawed), and the only evidence which was admissible to prove the principal's guilt, was the record of his conviction by the verdict of a jury in a court of competent jurisdiction. In England, and some of the American states, the common-law rule has been subverted by statute, which provides that an accessory before the fact to a felony "may be indicted, tried, convicted and punished, in all respects as if he were a principal felon." Our statute does not go so far. It provides (Acts of Assembly 1877, p. 312, c. 10, § 7) that "in the case of every felon, every principal in the second degree, and every accessory before the fact, shall be punished as if he were the principal in the first degree"; and by section 9, an accessory, either before or after the fact, may, whether the principal felon be convicted or not, or be amenable to justice or not, be indicted, convicted and punished, and an accessory before the fact may be indicted either with the principal or separately. These provisions are the same in the Code. It does not provide, as the Pennsylvania statute does, which is substantially a copy of the English statute, that he is to be indicted, tried and convicted in all respects as if he were the principal in the first degree.

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[55] Part of this case is omitted.

It is implied by the Virginia statute that he must be indicted, tried and convicted as an accessory before the fact, though he shall be punished as if he were the principal in the first degree. He may be indicted, convicted and punished, whether accessory before or after the fact, by express terms of the statute; but it is as accessory, whether the principal felon has been convicted or not, and the accessory before the fact may be indicted either with the principal or separately, of course, as accessory. He could only be indicted under this statute as accessory. It gives no authority to indict him as principal. Accordingly in Thornton's Case, 24 Grat. 669, 670, it was held by this court that "our statute has not gone far enough to make an accessory before the fact to a felony liable to be convicted on an indictment against him as principal." Upon this view of the statute the conclusion is obvious that an accessory to a felony cannot be prosecuted for a substantive offense but only as an accessory to the crime perpetrated by the principal felon, and in order to his conviction, although it is not necessary now to show that the principal felon has been convicted, it is necessary to show that the substantive offense, to which he is charged as having been accessory, has been committed by the principal felon.

The court is of opinion that the evidence is clearly insufficient to convict Oliver Hatchett, as principal, with administering the poison. * * *

The court is of opinion that the evidence is plainly insufficient to convict Oliver Hatchett, who is indicted as principal with the killing, or to show that he was guilty of administering the poison. * * *

Judgment reversed.[56]

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[56] By statute in England (11 & 12 Vict. c. 46), and in many of our states, the distinction between principals and accessories has been abolished. Some of

REX v. THOMPSON.

(Court of King's Bench, 1676. 2 Lev. 208.)

Error on a judgment on an indictment alleging that the defendant knowingly received and harbored divers thieves to the jury unknown, that had stolen divers goods, and committed divers burglaries. Exception. 1. That this is too general, and not more than alleging that one is a common receiver of felons; and cited Co. 3 Inst. 12, 13, indictment for using divers diabolical arts, Rolls, Indictment, 79, common oppressor of the neighborhood. These are bad, but common barretor is good because that term is well known. 2. Scienter recepit, is not good, but it ought to be that he knowing them to be thieves, received them, for he could know the persons and not know that they were thieves. 1 Cro. Bolton v. Banks, & Ibid. Kirmion v. Wells. 3. It ought to be that he feloniously received felonice recepit, for receipt of felons and harboring them knowing it is felony.

But it was not allowed, for, by the count 1, perchance the felons could be particularly known no more than the felonies and burglaries. And a house that harbors felons is a common nuisance as is a common bawdy house. And as to 2, Jones said that scienter had been lately ruled good in one Sallie's Case. And as to 3, the king may if he please waive the felony and indict for trespass. Upon which the judgment was affirmed.[57]

SECTION 2.—JOINDER OF DEFENDANTS

ANONYMOUS.

(Upper Bench, 1649. Style, 157.)

The court was moved to quash divers Endictments against the Inhabitants of the Parishes of Shoreditch and Hackney in Middlesex, for not repairing the High ways. The exception taken was, that the

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these statutes specifically provide that the accessory may be indicted as a principal. See Campbell v. Commonwealth, 84 Pa. 187 (1877); People v. Davidson, 5 Cal. 133 (1855).

[57] "It devolves on the commonwealth to show the guilt of the principal felon before a conviction of the accessory can be had; therefore it is necessary that an indictment against an accessory shall contain such allegation as to the commission of the crime and the guilt of the principal as would make it a good indictment against the principal: and these statements are indispensable to the validity of an indictment, whether joint or several." Pryor, J., in Tully v. Commonwealth, 11 Bush (Ky.) 158 (1874).

"It is in no case necessary to set forth the means by which the accessory before the fact incited the principal to commit the felony, or the accessory after received, concealed or comforted him." Fogler, J., in State v. Neddo, 92 Me. 77, 42 Atl. 255 (1898).

Parishes are jointly endicted, whereas their offences are several, and also not equal, and yet both fined alike. The Court quashed the Endictment, and discharged the issues which were not retorned, but not those that were retorned.

REX v. PHILIPS.

(Court of King's Bench, 1731. 2 Strange, 921.)

Six persons were indicted in one indictment for perjury, and four of them pleading were convicted. It was then moved, in arrest of judgment, that crimes (especially perjury) were in their nature several, and two cannot be indicted together. And Palm. 535. 6 Mod. 210. 2 Roll. Abr. 81, pl. 6, 7. Salk. 382. Pas. 11 Geo. I. Rex v. Weston et al., ante 623. Trin. 4 Geo. II. Rex. v. Clendon, ante 870. 1 Keb. 585, 612, 635, were cited.

E contra were cited Salk. 382, in extortion, Trin. 10 Anne, Regina v. Marshal, against two for receiving stolen goods. 1 Ven. 302. 3 Keb. 700, for maintenance. 2 Roll. Rep. 345. Palm. 367. Salk. 384, against husband and wife for keeping a disorderly house, and Regina v. Dixon et ux. Sti. 312. Cro. El. 230. 3 Leon. 230, where this exception was not taken in perjury. Cro. Car. 380.

Sed Per Curiam. There may be great inconveniences if this is allowed; one may be desirous to have a certiorari, and the other not; the jury on the trial of all may apply evidence to all, that is but evidence against one. The cases cited are all of that which may be joint, as extortion, maintenance, &c. but perjury is a separate act in each: and Trin. 6 Ann. Regina v. Hodson et al., two were indicted for being scolds, and compared to barretry, and held not to lie. The judgment was arrested. Strange pro def.[58]

CUSTODES v. TAWNY AND NORWOOD.

(Upper Bench, 1651. Style, 312.)

Tawny and Norwood were jointly endicted for blasphemous words severally spoken by them, upon the late statute made against blasphemy, and were convicted, the parties being removed hither by habeas corpus. It was urged that the endictment was not good, because it was joint, whereas the words being spoken by them severally, they ought to have been endicted severally; for the words spoken by one of them cannot be said to be the words of the other. But Roll, Chief Justice, said: The endictment was good enough though it be joint, as it is in the case of several perjuries, and several batteries, where a joint endictment doth lie, although it do not for several felonies, and here the endictment is upon one and the ~~same statute, and~~ for one and the same offence, and therefore the ~~judgment given~~ upon it is also good, and it shall be taken reddendo singula singulis (i. e.) the words to each of them as they spoke them.[59]

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[58] Accord: Uttering profane language. State v. Lancaster, 36 Ark. 55 (1880). Public drunkenness. State v. Deaton, 92 N. C. 788 (1885).

REX v. SUDBURY.

(Court of King's Bench, 1699. 12 Mod. 262.)

The defendants were indicted, for that they riotose et routose assemblaverunt, and so assembled committed a battery on Mary Russell. Two of them were found guilty, and all the others were acquitted; and judgment was arrested, ~~for two~~ cannot commit a riot.

But by HOLT, Chief Justice. If the ~~indictment~~ had been, that the defendants, with divers other disturbers of the peace, had committed this riot, and the verdict had been, in this case the king might have judgment.[60]

SECTION 3.—JOINDER OF OFFENSES

It is frequently advisable, when the crime is of a complicated nature, or it is uncertain whether the evidence will support the higher and more criminal part of the charge, or the charge precisely as laid, to insert two or more counts in the indictment. * * * Every separate count should charge the defendant as if he had committed a distinct offense, because it is upon the principle of the joinder of offenses, that the joinder of counts is admitted. 3 T. R. 106, 107. And to the supposed second or third offense in each count should be prefixed a statement that the jury super sacramentum suum ulterius præsentant. Holt, 687; 4 St. Tr. 686; 6 St. Tr. App. 56; 2 Salk. 632. Nor will the defect of some of the counts affect the validity of the remainder, for judgment may be given against the defendant upon those which are valid.

Chitty, Criminal Law, 248.

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[59] Accord: Singing libelous songs. Rex v. Benfield, 2 Burr. 980 (1760). False pretense. Young v. Rex, 3 T. R. 98 (1789). Disturbance of worship. Ball v. State, 67 Miss. 358, 7 South. 353 (1889).

[60] See, also, State v. Fox, 15 Vt. 22 (1843); State v. Davis, 2 Sneed (Tenn.) 273 (1854).

YOUNG v. REX.

(Court of King's Bench, 1789. 3 Term R. 98.)

An indictment was preferred at the sessions at Bristol against the defendants on the 30 Geo. II, c. 24, for obtaining ~~money~~ by false pretenses. * * * The defendants were found guilty, and sentenced to be transported for seven years. * * *

Fielding made five objections to the indictment.[61] * * *

The fourth objection was, that the second count in the indictment states a distinct offense, not arising ~~out of,~~ or connected with, the charge in the first count. The charge in the first count was that the bet was made with a colonel at Bath; in the second, that it was with Osmer, another of the defendants. This therefore should have been the subject of another indictment. It is not like the ordinary case of an indictment consisting of several counts, where they are only modifications of the same offense; for here is no mark of the entirety of the offense. These offenses are distinct in their nature, and lead to distinct punishments. But if a prisoner be indicted for two separate offenses, he may be confounded in his defense, and the minds of the jury distracted. In R. v. Roberts, Carth. 226, which was an information against the defendant, who was a ferryman, for receiving divers sums of money from different passengers, after a verdict of guilty, the judgment was arrested; and Holt, C. J., said: "In every such information, a single offense ought to be laid; they ought not to be accumulated under a general charge, because each offense requires a separate punishment." This count, then, charging a distinct offense, cannot be united with the first; neither can it be rejected as surplusage; but it vitiates the whole indictment. * * *

BULLER, J. * * * As to the remaining objection, that is founded on a point which once embarrassed me a great deal. Some years have elapsed since I looked into it, but I believe I can state pretty accurately how it stands. In misdemeanors, the case in Burrows shows that it is no objection to an indictment that it contains several charges. The case of felonies admits of a different consideration; but even in such cases it is no objection in this stage of the prosecution. On the face of an indictment every count imports to be for a different offense, and is charged as at different times. And it does not appear on the record whether the offenses are or are not distinct. But if it appear before ~~the defendant has pleaded, or the~~ jury are charged, that he is to be ~~tried for separate offenses, it~~ has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defense, or prejudice him in his challenge of the jury; for he might object to a jurym~~an's trying~~ one of the offenses, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge, who tries the prisoner, does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed. I did it at the last sessions at the Old Bailey, and hope that, in exercising that discretion, I did not infringe on any rule of law or justice. But if the case has gone to the length of a verdict, it is no objection in arrest of judgment. If it were, it would overturn every indictment which contains several counts. So where the evidence affects several prisoners differently, I have as was done by Mr. Justice Yates at Hereford, selected the evidence as applicable to each, and left their cases separately to the jury. And in a case which happened before me on the last Spring assizes at Exeter, where two prisoners were indicted for murder, and evidence given which pressed very hard on one prisoner, but was not admissible against the other, I thought it the soundest way of administering justice to sum up the evidence and take the verdict against each separately. But all these are mere matters of discretion only, which judges exercise in order to give a prisoner a fair trial; for when a verdict is given, they are not the subject of any objection to the record.

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[61] Part of this case is omitted.

Judgment affirmed.[62]

SECTION 4.—AMENDMENTS

ODINGTON v. DARBY.

(Court of King's Bench, 1612. Bulst. 35.)

YELVERTON, Justice.[63] Two years since, two were indicted before me at the assizes for felony, in case of life, and found guilty, and this indictment was in the singular number; and this appearing so unto me, I doubted whether the indictment was good or not, and so for this cause I made stay thereof; this afterwards I moved at the table to the judges, eight or nine of them being present, to have their opinions herein, and by all of them clearly the indictment was good, this notwithstanding, and well amendable, and so the same was accordingly amended, and the parties afterwards were hanged for the felony.

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[62] In some states statutes forbid the joinder of different offenses in the same indictment. See People v. De Coursey, 61 Cal. 134 (1882); State v. Morris, 45 Ark. 62 (1885).

"The English rule against the joinder of a felony and a misdemeanor in the same indictment has been greatly modified by modern decisions. It would be going too far to say now that it exists in any case, except it is where the offenses are repugnant in their nature and legal incidents, and the trial and judgment so incongruous as to tend to deprive the defendant of some legal advantage. Rex v. Ferguson, 29 Eng. Law & Eq. 536; Burk v. State, 2 Har. & J. (Md.) 426; Harman v. Commonwealth, 12 Serg. & R. 69; State v. Hooker, 17 Vt. 658; State v. Boise, 1 McM. 190; Rex v. Galloway, 1 Moo. C. C. 234; Whart. Am. C. L. § 423." Agnew, J., in Henwood v. Commonwealth, 52 Pa. 424 (1866). See, further, post, c. 15

[63] Part of this case is omitted.

ANONYMOUS.

(Upper Bench, 1654. Style, 433.)

Darcy moved that an endictment of Michaelmas term last might be amended in the caption. But Roll, Chief Justice, answered: It cannot be if it be of the last term, but had it been an endictment of this term it might have been amended.

ANONYMOUS.

(Upper Bench, 1651. Style, 321.)

Letchmore moved the court that the word publicæ might be put into an indictment which was removed hither by certiorari. But The Court answered it could not be; but because the indictment was of another term, the clerk of the peace was fined at £10. for his carelessness, and grosse oversight.[64]

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[64] Accord: As to material allegations. State v. McCarthy, 17 R. I. 370, 22 Atl. 282 (1891); State v. Chamberlain, 6 Nev. 257 (1871); People v. Trank, 88 App. Div. 294, 85 N. Y. Supp. 55 (1903). It is held in some states that the court may amend the indictment in matters of form without the consent of the grand jury and without an enabling statute. Hawthorn v. State, 56 Md. 530 (1881). Contra: State v. Squire, 10 N. H. 558 (1840). Statutes in some states permit amendments in certain particulars. State v. Corbett, 12 R. I. 288 (1879); Rosenberger v. Commonwealth, 118 Pa. 77, 11 Atl. 782 (1888); Shiflett v. Commonwealth, 90 Va. 386, 18 S. E. 838 (1894); Commonwealth v. Holley, 3 Gray (Mass.) 458 (1855). See, also, Reynolds v. State, 92 Ala. 44, 9 South. 398 (1890).

"The fundamental question here is 'whether an information may be amended, at common law, at the desire of the crown, after plea pleaded.' * * * Why should it not be amended? * * * There is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the king's suit. An officer of the crown has the right of framing them originally, and may, with leave, amend, in like manner as any plaintiff may do. If the amendment can give occasion to a new defense, the defendant has leave to charge [change] his plea; if it can make no alteration as to the defense, he don't want it." Lord Mansfield, in Rex v. Wilkes, 4 Burr. 2568, 2569 (1770).

PEOPLE v. RODLEY.

(Supreme Court of California, 1900. 131 Cal. 240, 63 Pac. 351.)

GRAY, C.[65] The defendant was convicted of perjury, and sentenced to imprisonment in the state prison for the term of 12 years. He appeals from the judgment and from an order denying his motion for a new trial. * * *

It appears that the grand jury made a partial report, and presented a true bill against defendant for perjury on December 15, 1899, and the clerk was directed by the court to file the same, and issue a bench warrant thereon for the arrest of defendant; and his bail was fixed at the sum of $5,000. The jury then retired for further deliberation. At 3 o'clock p. m. of the same day the grand jury returned into court, and, after being called, the court stated and the jury responded as follows: "The indictment which was presented this forenoon in the case of The People of the State of California v. J. Ellis Rodley, Defendant, was resubmitted by the court to the grand jury from the district attorney to correct an error that appeared upon the face of the indictment, in this: that it appeared from the indictment presented that the matter before the court at the time that J. Ellis Rodley was sworn was a petition for letters testamentary in the estate of Alfred Fuller, deceased, whereas the fact was, and it is in the knowledge of the court, that the petition called for letters of administration with the will annexed. Q. Have you now, Mr. Foreman, the indictment corrected in that respect? A. Yes. Q. Has it been submitted and voted upon after correction? A. Yes. Q. And it is now returned to this court as the correct indictment? A. Yes."

The clerk was thereupon directed to file the indictment, and that the record show that it had been resubmitted. A bench warrant was ordered to issue for the arrest of said J. Ellis Rodley, with bail fixed at $5,000. It was upon the indictment as amended that the defendant was arraigned, pleaded not guilty, and was thereafter tried. He was not arraigned on the indictment prior to its amendment. It appears from the foregoing that there must have been a variance between the indictment as originally presented to the court and the evidence upon which the indictment was found.

There is nothing in the law that will prevent the correction of a mere mistake like this, the result, no doubt, of an inadvertence. The defendant is injured in no way by the correction. "There is no doubt that, with leave of the court, an indictment may be amended by the grand jury at any time before the prisoner has pleaded, and before they are discharged." Thomp. & M. Jur. p. 704; Lawless v. State, 4 Lea (Tenn.) 173; State v. Creight, 1 Brev. (S. C.) 169, 2 Am. Dec.

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[65] Part of this case is omitted.

656. In the case of Terrill v. Superior Court, 127 Cal. XVIII, 60 Pac. 38, the question for determination was whether the court, after demurrer sustained to the indictment, could resubmit the case to the same grand jury that had found the first indictment. It was held that this could not be done under the Code provision cited therein; but the judge who delivered the opinion of the court in the course thereof remarked: "Perhaps, before the defendant has been arraigned, the indictment could be withdrawn, and by leave of the court sent back to the jury for amendment." This is what seems to have been done in the present case, and we can see nothing in it prejudicial to any right of defendant, and nothing of which he can be heard to complain. * * *

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Arraignment necessary, but better view seems to be that it can be waived.

They plead 1. to juris. 2. demurrer 3 abatement 4. special in bar, 5. general issue & [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] sanctuary & clergy; [illegible] after demurrer but Hale held no plea [illegible] Hawkins held the other view, & some courts in this country on misdemeanors.

CHAPTER XI

ARRAIGNMENT, PLEAS, AND MOTIONS

Nolle prosequi very [illegible] Quote, meet effect of it; atty's discretion but do not give statutory changes.

Something is made of motion to quash.

SECTION 1.—ARRAIGNMENT AND PLEAS IN GENERAL

Jeopardy, if offense against another county, it'll a good defense; seems, to [illegible] [illegible] Latest [illegible] cases on arraignment. [illegible] same felony. [illegible] [illegible] [illegible] with [illegible] Seems to admit [illegible] [illegible] case. Perhaps 194 establishes [illegible] [illegible] [illegible] but [illegible] seems hardly consistent.

When the offender in treason or felony comes into court, or is brought in by process, sometimes of capias, and sometimes of habeas corpus directed to the gaoler of another prison, the first thing that follows thereupon, is his arraignment. * * *

Arraignment, therefore, is nothing else but the calling of the offender to the bar of the court to answer the matter charged upon him by indictment or appeal. * * *

The arraignment of a prisoner, therefore, consists of these parts:

1. The calling the prisoner to the bar by his name, commanding him to hold up his hand, ~~which though~~ it may seem a trifling circumstance, yet it is of importance, ~~for~~ by holding up his hand constat de persona indictati and he owns himself to be of that name.

2. Reading the indictment distinctly to him in English, that he may understand his charge.

3. Demanding ~~of him whether he be guilty or~~ not guilty; and if he pleads not guilty, the clerk joins issue with him cul. prist, and enters the prisoner's plea. Then he demands how he will be tried. The common answer is, "By ~~God and the~~ country," and thereupon the clerk enters po. se, and prays to God to send him a good deliverance.

But if the prisoner hath any matter to plead either in abatement, or in bar of the indictment, as misnomer, auterfoits acquit, auterfoits convict, a pardon, etc., then he pleads it without immediate answering to the felony; but in some cases si trove ne soit, then to the felony not guilty, de quo postea. And thus far what the arraignment is. * * *

A man is said to ~~stand mute when~~, being arraigned for felony or treason, either (1) he answers not at all, or (2) if he answers with such matter as is not allowable for answer, and will not answer otherwise, or (3) where he pleads not guilty, but when demanded how he will be tried, either will say nothing, or not put himself upon the country.

If he stand mute and say nothing at all, in case of felony the court ought ex officio to impanel a jury and swear it as an inquest of office to inquire, whether he stand mute of malice, and if found so, he shall have the judgment of peine fort et dure, or whether it be ex visitatione Dei,[1] and, if found so, they are to inquire touching all those points, which he might possibly plead for himself, as whether a felony were done, whether he be the same person that is indicted for it, whether he did it, and whether he hath any matter to allege for his discharge.

But what if all this be found against the prisoner, what shall be done? Whether judgment of death shall be given against him, though he never pleaded, seems yet undetermined.[2]

2 Hale, Pleas of the Crown, 216, 316.

ANONYMOUS.

(Court of King's Bench, 1688. 3 Mod. 265.)

A gentleman was convicted ~~upon his own~~ confession for high treason in the rebellion of the Duke of Monmouth, and executed.

It was moved that his attainder might be reversed; the Judges were attended with Books, and the exceptions taken were, viz.:

First. There was no arraignment, or demanding of judgment.

Secondly. There was process of venire facias, which ought not to be in treason, but a capias.

Thirdly. Because after the confession ~~the~~ judgment followed, and it does not appear that the party was asked what he could say why sentence of death ~~shall~~ not pass upon him; for possibly he might have pleaded a pardon.

For these reasons the attainder was reversed.

FITZHARRIS' CASE.

(Court of King's Bench, 1681. Vent. 354.)

Edward Fitzharris was indicted ~~of High~~ Treason; upon which being arraigned, and demanded to plead, he delivered in a Paper containing a Plea to the Jurisdiction of the Court; which could not be received (as the Court said), not being under Counsel's Hand. Whereupon he prayed to have Counsel assigned, and named divers, whereof the Court assigned four. And he was taken from the Bar, three or four Days being given him to advise with his Counsel, to prepare his Plea as they would stand by him.

The Counsel prayed, that ~~they might~~ have a Copy ~~of the~~ Indictment. But the Court denied it and said, That it was not permitted in Treason, or any other capital Crimes.

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[1] For procedure on arraignment of a dumb person, see Thompson's Case, 2 Lewin, C. C. 137 (1827).

[2] It is now generally provided by statute that, on failure to plead, a plea of not guilty shall be entered. Reg. v. Bernard, 1 Fost. & F. 240 (1858); Commonwealth v. Place, 153 Pa. 314, 26 Atl. 620 (1893).

But Justice DOLBEN said, That sometimes it had been allowed to take Notes out of the Indictment. Vid. Mirror, 304. Abusion est que Justices ne monstre l'Indictment a les Indictes s'ils demandront. Section 115.

And note, by St. 7 W. III, c. 3. Persons indicted of Treason where Corruption of Blood is, are to have a copy of their Indictment five Days before their Trial.[3]

HOSKINS v. PEOPLE.

(Supreme Court of Illinois, 1876. 84 Ill. 87, 25 Am. Rep. 433.)

Mr. Justice SCOTT delivered the opinion of the court.

Defendant was ~~indicted~~, at the August term of the circuit court of Marion county, for larceny. On the trial, he was found guilty, and sentenced to the penitentiary for a period of three years.

It appears, from the record, that defendant "waived arraignment, copy of indictment, list of jurors and witnesses," etc., but no plea of any kind was entered. ~~So far as this~~ record discloses, no plea was entered before the accused was placed on trial. On the authority of the former decisions of this court, this was error. Johnson v. People, 22 Ill. 314; Yundt v. People, 65 Ill. 372. It was held in those cases that, without an issue formed, there could be nothing to try, and the party convicted could not, properly, be sentenced. This error may be corrected, and the accused may be arraigned and required to plead to the indictment before he is again placed on trial.

The judgment will be reversed and the cause remanded.

Judgment reversed.

SHELDON, C. J., and BREESE and CRAIG, JJ., do not concur in this opinion. The record shows the prisoner expressly waived an arraignment, which, per se, includes the plea. We think the waiver of arraignment was a waiver of the formal entry of a plea of not guilty. The prisoner has had a fair trial by jury, and was adjudged guilty. The entry of a plea, under the circumstances, was mere form, and unnecessary. If objections so technical as this are to prevail, it will be difficult to enforce the Criminal Code. The prisoner has had an impartial trial by a jury of the vicinage, on a good indictment, and was tried in the same manner and asked instructions as though a plea of not guilty had been interposed. We perceive no ground for reversing the judgment, as the facts proved are conclusive against him.[4]

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[3] While, on arraignment, indictment should be read in full, yet, if the formal concluding part is omitted, it will not vitiate a sentence pronounced on a plea of guilty. State v. Crane, 121 La. 1039, 46 South. 1009 (1908).

[4] "In State v. Cassady, 12 Kan. 550, the announcement by the defendant that he was ready for trial upon the information was treated as a denial of guilt and an informal plea. Here the ~~defendant not~~ only did not plead, but the opportunity for pleading ~~was never extended~~ to him, although he was charged with felony. So wide a departure from the established rules of criminal pro-

HACK v. STATE.

(Supreme Court of Wisconsin, 1910. 141 Wis. 346, 124 N. W. 492.)

WINSLOW, C. J.[5] The plaintiff in error (hereinafter called the defendant) was convicted of selling whisky to a minor of the age of 13 years, and brings his writ of error to reverse the judgment. * * *

By a singular oversight the defendant was not formally arraigned in the circuit court, and never pleaded to the information. An information in due form was filed; the jury was called and sworn; witnesses for both the state and the defendant were examined and cross-examined; the jury was charged by the court, and rendered its verdict, in all respects as though issue had been formally joined. Inasmuch as the information was valid, and the jury duly sworn and charged with the defendant's deliverance, he was put in jeopardy, so that, had he been acquitted, he could not have been again prosecuted. He knew perfectly well the offense with which he was charged, and was allowed to make his defense just as fully and effectively as if a plea of not guilty had been made, and the question now is whether the inadvertent omission of arraignment and plea, which has not in the least affected any substantial right of the defendant, should be held fatal to the judgment.

It is freely conceded that the early Wisconsin decisions answer this question in the affirmative. Anderson v. State, 3 Pin. 367; Douglass v. State, 3 Wis. 820; Davis v. State, 38 Wis. 487. See, also, Crain v. U. S., 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, where the authorities are reviewed, and the doctrine contended for by the defendant fully sustained by a divided court.

It must also be conceded that it is held by the Supreme Court of the United States, in the Crain Case, that arraignment and plea are essential to due process of law, guaranteed to the citizen by the fourteenth amendment. A state could not, therefore, pass a law providing for trial without arraignment or plea; but that does not necessarily affect the question whether a citizen may not effectually waive that right. This court has held that constitutional rights may be waived by the defendant, except, perhaps, in capital cases. Thus an accused person has the absolute constitutional right to a trial by a jury, which means a body of 12 competent jurymen, yet this court held, as early as the case of State v. Vogel, 22 Wis. 471, that by not exercising his right of challenge the defendant waived all objections to the qualifications of jurors, and a verdict of guilty would stand, notwithstanding the fact that one of the jurors was an alien, and the further fact that his alienage was not known to the defendant. * * *

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cedure cannot be approved." Johnston, J., in State v. Baker, 57 Kan. 545, 46 Pac. 948 (1896).

See Tarver v. State, 95 Ga. 222, 21 S. E. 381 (1894).

[5] Part of this case is omitted.

The ancient doctrine that the accused could waive nothing was unquestionably founded upon the anxiety of the courts to see that no innocent man should be convicted. It arose in those days when the accused could not testify in his own behalf, was not furnished counsel, and was punished, if convicted, by the death penalty, or some other grievous punishment out of all proportion to the gravity of his crime. Under such circumstances it was well, perhaps, that such a rule should exist, and well that every technical requirement should be insisted on, when the state demanded its meed of blood. Such a course raised up a sort of a barrier which the court could utilize when a prosecution was successful which ought not to have been successful, or when a man without money, without counsel, without ability to summon witnesses, and not permitted to tell his own story, had been unjustly convicted, but yet under the ordinary principles of waiver, as applied to civil matters, had waived every defect in the proceedings. Thanks to the humane policy of the modern criminal law, we have changed all these conditions. The man now charged with crime is furnished the most complete opportunity for making his defense. He may testify in his own behalf; if he be poor, he may have counsel furnished him by the state, and may have his witnesses summoned and paid for by the state; not infrequently he is thus furnished counsel more able than the attorney for the state, in short the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation. The reasons which in some sense justified the former attitude of the courts have therefore disappeared, save perhaps in capital cases, and the question is: Shall we adhere to the principle based upon conditions no longer existing? No sound reason occurs to us why a person accused of a lesser crime or misdemeanor, who comes into court with his attorney, fully advised of all his rights, and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it.

Surely the defendant should have every one of his constitutional rights and privileges, but should he be permitted to juggle with them? Should he be silent when he ought to ask for some minor right which the court would at once give him, and then when he has had his trial, and the issue has gone against him, should he be heard to say there is error because he was not given his right? Should he be allowed to play his game with loaded dice? Should justice travel with leaden heel because the defendant has secretly stored up some technical error, not affecting the merits, and thus secured a new trial because forsooth he can waive nothing? We think not. We think that sound reason, good sense, and the interests of the public demand that the ancient strict rule, framed originally for other conditions, be laid aside, at least so far as all prosecutions for offenses less than capital are concerned. We believe it has been laid aside in fact (save for the single exception that trial by a jury of 12 cannot be waived unless authorized by a specific law) by the former decisions of this court. It is believed that this court has uniformly attempted to disregard mere formal errors and technical objections, not affecting any substantial right, and to adhere to the spirit of the law which giveth life rather than to the letter which killeth. It may not always have succeeded; it is intensely human, but since the writer has been here he knows that the attempt has been honestly made.

In this line the court is glad to welcome legislative assistance and approval. By chapter 192, p. 205, Laws 1909 (section 3072m was added to St. 1898), it is provided that no judgment, civil or criminal, shall be set aside or new trial granted for any error in admission of evidence, direction of the jury, or any error in pleading or procedure, unless it shall appear that the error complained of has affected the substantial rights of the party complaining. How much this adds to the provisions of section 2829, which has been on the statute books since 1858, is not entirely clear. At least it shows the legislative intent to specifically apply the law to criminal actions. Its terms are clear, and will unquestionably assist the court in its effort to do substantial justice in all actions, either civil or criminal, without regard to immaterial errors or inconsequential defects. This court will loyally stand by this law, and will earnestly endeavor to administer it so as to do equal and exact justice, so far as human effort can accomplish that end.

Our conclusion is that the doctrine of Douglass v. State, supra, and the cases following it, should be overruled. The principle now declared is that the right of arraignment and plea will be waived by the defendant by his silence when he ought to demand it, in all cases (except capital cases) where it appears that he is fully informed as to the charge against him, and is not otherwise prejudiced in the trial of the case by the omission of that formality. Other Code states so hold. People v. Osterhout, 34 Hun, 260; People v. Bradner, 107 N. Y. 1, 13 N. E. 87; State v. Cassady, 12 Kan. 550; State v. Straub, 16 Wash. 111, 47 Pac. 227; Hudson v. State, 117 Ga. 704, 45 S. E. 66.

* * *

Judgment affirmed.[6]

KERWIN, J., dissents. TIMLIN, J. (dubitante).

We are now to consider the plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess or stand mute. This is either: (1) A plea to the jurisdiction; (2) a demurrer; (3) a plea in abatement; (4) a special plea in bar; or (5) the general issue. * * * Formerly there was another plea, now abrogated, that of sanctuary.[7] * * * Formerly also the benefit of clergy used to be ~~pleaded~~ before trial or conviction, and was called a declinatory plea.[8] * * * A plea to the jurisdiction is where an indictment is taken before a court that hath no cognizance of the offense. * * * A demurrer to the indictment. This is incident to criminal cases as well as civil, when the fact alleged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. * * * Some have held (2 Hale, P. C. 257) that if, on demurrer, the point of law be adjudged against the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others (2 Hawk. P. C. 334), who hold that in such case he shall be directed and received to plead the general issue, ~~not guilty, after a~~ demurrer determined against him, which appears the more reasonable.

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[6] By statutory provision in some states arraignment may be waived. See State v. Thompson, 95 Iowa, 464, 64 N. W. 419 (1895); People v. Tower, 63 Hun, 624, 17 N. Y. Supp. 395 (1892); State v. Hoffman, 70 Mo. App. 271 (1897); State v. Brock, 61 S. C. 141, 39 S. E. 359 (1900).

A plea in abatement is principally for a misnomer, a wrong name, or false addition to the prisoner.

Special pleas in bar, which ~~go to the~~ merits of the indictment, and give a reason why the prisoner ~~ought~~ not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: A former acquittal, a former conviction, a former attainder, or a pardon.

4 Black. Com. c. XXVI.

REGINA v. FADERMAN.

(Central Criminal Court, 1850. 3 Car. & K. 353.)

Demurrer. The prisoners were indicted at the Central Criminal Court of the February session, 1850, and Mr. Justice Vaughan Williams stated the following case for the opinion of the Court for Crown Cases Reserved:

"The prisoners were indicted under Stat. 1 Wm. IV, c. 66, § 19, by which it is made a felony to engrave, etc. (without authority), on any plate or on ~~any wood,~~ stone or other material, any bill of exchange, promissory note, undertaking or order for the payment of money or any part of any bill of exchange, etc., of any foreign prince or state, or knowingly to have in possession any plate, etc., so engraved, or to utter or to knowingly have in possession any paper on which any part of such foreign bill, etc., shall be made or printed.

"The counsel for the prisoners demurred to the indictment, and the demurrer having been argued, I gave judgment for the crown. But I reserved the question as to the validity of the indictment (a copy of which will accompany this statement) for the consideration of this court. [Signed] Edw. Vaughan Williams."[9]

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[7] See 2 Pollock & Maitland's Hist. Eng. Law (1st Ed.) 588.

[8] See 1 Pollock & Maitland's Hist. Eng. Law (1st Ed.) 424 et seq.

ALDERSON, B., now delivered the opinion of the [Central Criminal] Court as to what judgment should be entered up on the demurrer. His Lordship said:

The first question is whether this demurrer can be sustained, and it is the unanimous opinion of the court that the demurrer must be overruled, inasmuch as it appears to the court that many of the counts in this indictment are clearly good; and as one good count would be sufficient to authorize a conviction and judgment, the court is clearly of opinion that this demurrer, which goes to the sufficiency of the whole indictment, must be overruled. A more important question remains to be disposed of, which is as to what judgment this court ought to pronounce on the demurrer being overruled. Whether the prisoners are to be allowed to plead over? or whether final judgment should be passed upon them as in the case of a conviction? We have taken time to look into the authorities on the subject, and have taken considerable pains to ascertain what is the right course to be taken in this case, and the result at which we have arrived is that the judgment must be final, inasmuch as by a general demurrer, which this is, the prisoners confess all the material facts charged against them in the indictment. In the case of a demurrer of a special nature, which is usually called a demurrer in abatement, it may be otherwise; and it is very probable that the various dicta which occur in the books in opposition to our present decision may be accounted for by this distinction not having been sufficiently attended to.

Parry, for the prisoner, asked that they might be allowed to withdraw the demurrer, and plead not guilty.

ALDERSON, B. We cannot allow that, and I think that such a proceeding ought not to be encouraged.

On a subsequent day sentence was passed on the prisoners.[10]

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[9] The Court for Crown Cases Reserved held it had no jurisdiction in a case in which judgment had been given on a demurrer and therefore gave no judgment. The proceedings in that court are here omitted.

[10] Accord: Where the indictment is for a misdemeanor. Wickwise v. State, 19 Conn. 477 (1849); McCuen v. State, 19 Ark. 630 (1858). It is in the discretion of the court, however, to allow the defendant to answer over. Commonwealth v. Gloucester, 110 Mass. 500 (1872); State v. Wilkins, 17 Vt. 151 (1845). It is generally said, in the cases in this country, that, while judgment adverse to defendant on a demurrer to an indictment for a misdemeanor is final, the like judgment on an indictment for felony must be respondeat ouster. State v. Merrill, 37 Me. 329 (1853); Commonwealth v. Foggy, 6 Leigh (Va.) 638 (1836); McCuen v. State, 19 Ark. 630 (1858). In some states, by statute, the right to plead over is secured to the defendant, even in cases of misdemeanor. Thomas v. State, 6 Mo. 457 (1840).

COMMONWEALTH v. INGERSOLL.

(Supreme Judicial Court of Massachusetts, Essex, 1887. 145 Mass. 381, 14 N. E. 449.)

Complaint to the police court of Gloucester, for keeping intoxicating liquors with intent unlawfully to sell the same in this commonwealth.

The record recited that the defendant was arrested and brought before said court, and the complaint read to him, "and, being asked whether he is guilty or not of the offense within charged upon him, pleads nolo contendere, but, after hearing divers witnesses duly sworn to testify the whole truth, and fully understanding the defense of said defendant, it is adjudged by the said court that said defendant is guilty of said offense," and that the defendant was sentenced.

From this sentence the defendant appealed to the superior court, and at May term, 1886, at the request of the defendant, the complaint was placed upon file.

At January term, 1887, the defendant having been convicted upon another complaint, the district attorney moved for sentence upon the former complaint. Whereupon the defendant claimed the right to plead anew, and filed a motion therefor, upon the following grounds: "(1) That it did not appear by the record of said police court that the plea of nolo contendere was received with the consent of the public prosecutor, or accepted by the commonwealth, or by the court. (2) That no plea had been entered in said police court upon which the defendant could be legally tried."

Hammond, J., overruled this motion, and ruled that there was nothing for the jury, and that the case was ripe for sentence. The defendant alleged exceptions.

A. J. Waterman, Attorney General, for the Commonwealth. F. L. Evans, for the defendant.

Morton, C. J. If the defendant in a criminal case pleads guilty, he cannot afterwards retract his plea and plead anew, except by leave of the court. If, therefore, a defendant pleads guilty in a municipal or police court, and appeals from the sentence to the superior court, he cannot of right claim a trial by jury, but is liable to be sentenced upon his original plea in the court below, unless the court gives him leave to plead anew. Commonwealth v. Mahoney, 115 Mass. 151. A plea of nolo contendere, when accepted by the court, is, in its effect upon the case, equivalent to a plea of guilty. It is an implied confession of guilt only, and cannot be used against the defendant as an admission in any civil suit for the same act. The judgment of conviction follows upon such a plea, as well as upon a plea of guilty, and such plea, if accepted, cannot be withdrawn, and a plea of not guilty entered, except by leave of court. But there is a difference between the two pleas, in that the defendant cannot plead nolo contendere without the leave of the court. If such plea is tendered, the court may accept or decline it in its discretion.

If the plea is accepted, it is not necessary or proper that the court should adjudge the party to be guilty, for that follows as a legal inference from the implied confession, but the court proceeds thereupon to pass the sentence of the law. Commonwealth v. Horton, 9 Pick. 206.

In Commonwealth v. Adams, 6 Gray, 359, the complaint was founded upon St. 1855, c. 215, § 35, which provided that "no admission of the defendant, made in court, shall be received on the trial, without the consent of the prosecutor, except a plea of guilty." The defendant pleaded nolo contendere in the police court, but the record did not show that the plea was received with the consent of the prosecutor. This court held that such consent must appear of record, and that, as it did not so appear, judgment entered upon his plea by the court of common pleas to which the defendant had appealed, was erroneous, and that he had the right to plead anew, and to be tried by a jury.

Applying these principles to the case at bar, it follows that, if it appeared by the record of the police court, to which the complaint was made, that the defendant's plea of nolo contendere was accepted by the court, the superior court, upon appeal, could sentence him upon his plea, and decline to permit him to plead anew.

The only difficulty arises from the obscurity of the record of the police court. It recites that the defendant, "being asked whether he is guilty or not of the offense within charged upon him, pleads nolo contendere, but, after hearing divers witnesses duly sworn to testify the whole truth, and fully understanding the defense of said defendant, it is adjudged by the said court that said defendant is guilty of said offense." This record does not state that the court accepted the plea. The latter part of the record above cited implies that the court did not accept the plea, but proceeded to hear witnesses, and adjudged the defendant to be guilty, as if he had pleaded "not guilty," or had stood mute. If the record had stated that the defendant pleads nolo contendere, and thereupon the court passes sentence upon him, it might be held that it showed an accepted plea, although not directly stated to have been accepted, because in such case the action of the court upon the plea would import that it was accepted. But in this case the record implies, not that the court passed sentence upon the plea of nolo contendere, but upon an adjudication, after hearing witnesses, that the defendant was guilty. To say the least, the record does not certainly show that the plea was accepted and sentence passed thereupon; and we are of opinion that the defendant had the right to plead anew in the superior court, and to have a trial by jury.

Exceptions sustained.[11]

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[11] See, also, Commonwealth v. Holstine, 132 Pa. 357, 19 Atl. 273 (1890).

In some states statutes provide that in capital cases the plea of guilty shall not be received. State v. Genz, 57 N. J. Law, 459, 31 Atl. 1037 (1895).

"By a plea of guilty the defendant confesses himself guilty in manner and form as charged in the indictment; and if the indictment charges no offense

ANONYMOUS.

(Court of King's Bench, 1691. 4 Mod. 61.)

The defendant, some years since, killed one J. S. and fled for the same. He appeared, and was tried the last assizes in H., and found guilty of murder; and being brought to the bar, he pleaded his pardon. * * * [12]

The pardon was allowed.[13]

SECTION 2.—NOLLE PROSEQUI AND MOTION TO QUASH

STATE v. SMITH.

(Supreme Judicial Court of New Hampshire, 1870. 49 N. H. 155, 6 Am. Rep. 480.)

Five indictments were found March term, 1869, against Willard Smith, three of them for selling liquor, one for keeping liquor for sale, and one for being a common seller. At March term, 1869, respondent pleaded "not guilty." At the September term, the solicitor stated that he believed that the respondent had ceased the sale of liquor, and that he had arranged with respondent's counsel that, if the respondent pleaded nolo contendere to all the indictments, the state would at this time move for sentence on only one indictment, reserving the right to bring forward the other indictments and move for sentence if the respondent should, in future, violate the liquor law. Thereupon Peter Sherman moved for leave to appear and prosecute the indictments, alleging that he was the complainant, and entitled to half the fines, and that respondent has not ceased the sale of liquor. Sherman also moved that, if necessary, to entitle him to appear, or to receive half the fine, the indictments might be so amended as to aver that he was the complainant. The solicitor and the respondent both objected.

For the purpose of allowing the questions thus arising to be reserved, it was ruled pro forma, and subject to exception, that Sher-

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against the law, none is confessed." McEnery, J., in State v. Watson, 41 La. Ann. 599, 7 South. 126 (1889).

[12] Part of this case is omitted.

[13] "Hawkins, bk. 2, c. 37, § 59, says: 'But it is certain that a man may waive the benefit of a pardon under the great seal, as where one who hath such a pardon doth not plead it, but takes the general issue, after which he shall not resort to the pardon.' In section 67 he says: 'An exception is made of a pardon after plea.' A court would undoubtedly at this day permit a pardon to be used after the general issue. Still, where the benefit is to be obtained through the agency of the court, it must be brought regularly to the notice of that tribunal." Marshall, C. J., in U. S. v. Wilson, 7 Pet. 161, 8 L. Ed. 640 (1833).

man's motions should be granted, if it should hereafter be made to appear, by proper proof, that he was complainant.

Case reserved.

NESMITH, J.[14] No question is made, by the counsel on either side, as to the general discretionary ~~power of the~~ prosecuting officer, in this state, to enter a nolle prosequi in ordinary indictments instituted in the name of ~~the state.~~ This power such officer exercises virtute officii, frequently before a jury is impaneled, and sometimes while the case is on trial before the jury, with the consent of the respondent, and sometimes after a verdict is rendered against the prisoner.

It may be that the prosecuting officer finds his indictment defective in form or substance, and that he may wish to procure a better one, or he may discover that the evidence will not sustain the charge as alleged, and a change may be requisite to conform to the actual proof. There may be various reasons for discontinuing the prosecution, all which he must determine, being controlled by well-settled principles of law and practice, and a sound legal discretion. It is not to be presumed that this officer will voluntarily consent to any discontinuance which will materially injure the rights of the prisoner, or that he will violate knowingly his official trust, or in any way act corruptly or oppressively.

Generally, whether a jury shall be impaneled, or not, depends upon the determination of the prosecuting officer; but, when a jury is organized and the trial commences, the respondent then acquires new rights, which the court will protect. It may be regarded as the respondent's right to have the jury pass upon the facts of his case, because their verdict becomes a bar to another indictment for the same offense, and a nolle prosequi will not thus operate for the prisoner's benefit. Therefore, in this state of the proceedings, the prisoner having a right to insist upon a verdict upon the whole evidence of the case, of course, there can be no discontinuance of the prosecution except upon the prisoner's express consent.[15]

These elementary principles are discussed in Aaron Burr's Trial,

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[14] Part of this case is omitted.

[15] Accord: Commonwealth v. Scott, 121 Mass. 33 (1876). But see State v. Roe, 12 Vt. 93 (1840); Wilson v. Commonwealth, 3 Bush (Ky.) 105 (1867).

"Any part of a count, which is in its nature severable from the rest, may be removed by nolle prosequi, and the remainder stand." Peters, C. J., in State v. Bean, 77 Me. 487 (1885).

"The power of the court to order the representative of the state to enter a nolle prosequi upon an indictment presents a different question. At the common law only the Attorney General could exercise this power, and in doing so was beyond the power or control of the court. 1 Arch. Cr. Plead. (Pomeroy's Notes) 316; People v. McLeod, 1 Hill [N. Y.] 377 [37 Am. Dec. 328]; State v. Graham, 41 N. J. Law, 15 [32 Am. Rep. 174]." Knapp, J., in State v. Hickling, 45 N. J. Law, 154 (1883).

"There seems no good reason why the motion of the attorney for the government (to strike off an entry of nol. pros. from the docket) should not have been granted, and in granting it the court took especial care that the seriatim; also in Commonwealth v. Tuck, 20 Pick. 365, and other cases cited by respondent's counsel. In the latter case, Chief Justice Shaw claims the power to the Attorney General, or other prosecuting officer, to enter a nolle prosequi after verdict against the prisoner, and says such a practice has prevailed for many years, and is found highly useful to the due administration of the criminal law. It may be ascertained that the party convicted may still be innocent. It may become important to use him as a witness against more flagrant offenders. The power to enter a nolle prosequi exists in the prosecuting officer. He exerts it upon his official responsibility. The court has no right to interfer in its exercise. They can only judge of the effect of the act, when done, or of the legal consequences which may follow from it. The court will take care that it shall not operate to the prejudice of the respondent's rights. Commonwealth v. F. O. J. Smith, 98 Mass. 10; 1 Chitty's Crim. Law, 479 and 845.

The counsel for the prosecutor, Sherman, claims the right for his client to interfere with the practice of the solicitor in this particular case, and asked for leave of the court to be granted to him to appear and prosecute these indictments. Under a fair construction of section 21 of chapter 99 of the General Statutes, we think it was the clear intent of the Legislature to give him, who might volunteer to prosecute for the violations of the law embraced in this chapter, a bounty or a reward equal to one-half the fines that should be collected by means of such prosecutions. As the statute in this case prescribes no new mode of proceeding under it, in order to establish the right of the complainant to recover his bounty, it must be presumed that he must obtain his remedy according to the ordinary rules of practice, as known in our courts. It therefore cannot be presumed that the complainant can come into court, and oppose the predetermined action of the prosecuting officer, or that he can set up his will as superior to the fiat of the officer. Such a practice would introduce confusion into this department of the law. An attempt of the kind indicated by the prosecutor's motion was lately made in the Court of the Queen's Bench, in England, and failed there for the reasons suggested by the justices of that court. Regina v. Allen, 1 Best & Smith, 101 (Eng. C. L. Reports, 854). * * *

Motion denied.

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prisoner should not suffer therefrom in his defense." Appleton, J., in State v. Nutting, 39 Me. 362 (1855).

Accord: Parry v. State, 21 Tex. 746 (1858). But see Henry v. Commonwealth, 4 Bush (Ky.) 427 (1868); Kistler v. State, 64 Ind. 371 (1878).

PEOPLE v. DAVIS.

(Court of Appeals of New York, 1874. 56 N. Y. 95.)

GROVER, J.[16] The indictment charged the commission of the crime at the town of Brookfield, in the county of Madison, and within 500 yards of the boundary line between the county of Otsego and the county of Madison. The counsel for the accused moved to quash it because the crime was not charged to have been committed in the county of Otsego. * * *

The counsel for the prisoner also excepted to the denial of his motion to quash the third count, or to compel the prosecutor to elect upon which offense therein charged he would proceed. The denial of this motion was not the proper subject of an exception. The accused has not a legal right to have the sufficiency of an indictment, or of any count therein, determined upon motion to quash or set it aside, or to put the prosecutor to an election, when more than one offense is charged, upon which he will proceed. It is in the discretion of the court whether or not to set aside a defective indictment upon motion; and unless the question is free from doubt, the court ought not to do it, but leave the counsel to his demurrer, or motion in arrest of judgment. * * *

STATE v. RIFFE.

(Supreme Court of Appeals of West Virginia, 1877. 10 W. Va. 794.)

MOORE, Judge, delivered the opinion of the court.[17]

An indictment was found in the circuit court of Monroe county against A. L. Riffe for selling spirituous liquors without license. On the 18th October, 1872, the defendant appeared and plead not guilty; and on the 16th October, 1874, defendant again appeared, and moved the court to quash said indictment, which motion was sustained, and the defendant discharged. Thereupon the state petitioned for and obtained from this court a writ of error, and in that way presents the case for the adjudication of this court upon two alleged grounds of error. * * *

It was error to quash the indictment, for the reason that the motion came too late; the defendant having long before plead to the indictment. * * *

As to the question that the motion to quash was made after the plea had been entered: The proper course is to move to quash before pleading, but the court may, at any time before the trial upon the plea, permit the plea to be withdrawn, and enter the motion to quash, at the instance of the defendant.

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[16] Part of this case is omitted.

[17] The arguments of counsel and parts of the opinion are omitted.

The judgment of the circuit court should be reversed, with costs to the state against the defendant, and the case remanded to the circuit court, to be proceeded in according to the principles enunciated in this opinion, and further according to law.

Judgment reversed and case remanded.

SECTION 3.—PLEA OF FORMER JEOPARDY

If they [the jurors] declare upon their oaths that they know nothing of the fact, let others be called who do know it, and if he who put himself on the first inquest will not put himself on a new jury, let him be remanded back to penance till he consents thereto.

Britton (Nichol's Trans.) lib. 1, 12 b.

It is a good plea on appeal or indictment of felony to say that he was formerly arraigned for the same felony before such justices, &c., and acquitted, and to vouch the record; for he is not required to have the record in hand, for this plea is not a dilatory plea, but a plea in bar, as appears, tit. Coron. in Fitz. P. 232. M. 20 E. 2. &c., such plea is a good bar, because a man by the common law should not put his life twice in jeopardy of trial for the same felony, except it be in some special case, of which I will speak hereafter. But note that it ought to be the same offense, for otherwise his plea is not to the purpose, and therefore if two men are indicted of felony as principals, and then by another indictment it is found that one committed the felony and the other only feloniously received him after the felony was committed, and upon the first indictment both are arraigned and acquitted, and then he who is indicted as accessory is arraigned, and he pleads that he was formerly acquitted as above, this plea should not discharge him, because it is not the same offense, but a different one, for it is done on different days, which see titulo Corone in Fitz. P. 200; anno 27 lib. ass. P. 10, and H. 8. H. 5. P. 493. But if he was indicted as an accessory before the offense committed, this acquittal of him as a principal should discharge him of this offense also, for it is in manner one offense although it is done on several days, for when the felony is committed by force of command or abetment the one who commands in such case is a party to the principal felony. But it is otherwise with the accessory after the felony committed, and with this agrees Bracton.

Staunford, P. C. lib. 2, c. 36, p. 105.

If a man be acquitted on an appeal or upon the indictment, although there be error in the process, the acquittal is good. But it is different where the appeal or the indictment was not sufficient, etc.

Fitz. Corone, fol. 259, pl. 444.

HUTCHINSON'S CASE.

(Court of King's Bench, 1677. 1 Leach, C. C. 135, note.)

Mr. Hutchinson, who had killed Mr. Colson in Portugal, was acquitted there of the murder; and being afterwards apprehended in England for the same fact, and committed to Newgate, he was brought into the Court of King's Bench by habeas corpus, where he produced an exemplification of the record of his acquittal in Portugal; but the king being very willing to have him tried here for the same offense, it ? was referred to the consideration of ~~the judges, who all~~ agreed that, as he had been already acquitted of the charge by the law of Portugal, he could not be tried again for it in England.[18]

JONES AND BEVER'S CASE.

(Court of King's Bench, 1665. Kelyng, 52.)

At the Gaol-delivery in the Old Baily, 19 February, 1665, John Jones and Philip Bever, were indicted for Burglary for breaking the King's House at Whitehall, and stealing from thence the Goods of the Lord Cornbury, and were found not Guilty. And after were indicted for the same Burglary, and stealing the Goods of Mr. Nunnesy. And we agreed that they being once acquitted for the Burglary, could not be indicted again for the same Burglary, but ~~might~~ be indicted for stealing the Goods of Mr. Nunnesy according as it was formerly resolved in Turner's Case. Vide Kelyng, 30. But in this case when we

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? [18] But an acquittal by a court-martial is no bar to a subsequent prosecution before a court of law. In re Fair (C. C.) 100 Fed. 149 (1900). So an act may offend against the law of more than one jurisdiction, in which case a conviction or acquittal in one jurisdiction is no bar to a prosecution in the other. State v. Norman, 16 Utah, 457, 52 Pac. 986 (1898); State v. Reid, 115 N. C. 741, 20 S. E. 468 (1894). Compare People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751 (1889).

saw the Evidence not sufficient to prove the stealing of my Lord Cornbury's Goods, we might have discharged the jury and so taken no Verdict;[19] and then he might have been indicted for that Burglary, and stealing the Goods of Mr. Nunnesy.

REX v. JANE D——.

(Court of King's Bench, 1670. Vent. 69.)

She was indicted for stealing of several things, and pleaded not guilty, and a jury sworn to try her; the witnesses, not appearing, were suspected to be tampered with by the prisoner; and the jury were discharged, and the trial put off.[20] Vide 1 Inst. 227, b, contra.

WETHEREL v. DARLY.

(Court of King's Bench, 1583. 4 Coke, 40a.)

Wetherel brought an appeal against Darly of murder. The defendant pleaded not guilty, and was found guilty of homicide, and had his clergy; and afterwards was indicted of murder, and thereupon arraigned at the suit of the queen; and he pleaded the former conviction in the appeal at the suit of the party; and it was adjudged a good bar. And thereupon he was discharged, for it was a good bar by the common law, and restrained by no statute; and the reason is, because a man's life shall not be twice put in jeopardy for one and the same offense.[21]

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[19] "By the ancient law if the jury sworn had been particularly charged with a prisoner, as before is showed, it was commonly held * * * they could not be discharged before their verdict given up. * * * But nothing is more ordinary than after the jury sworn, and charged with a prisoner, and evidence given, yet if it appear to the court that some of the evidence is kept back, or taken off, or that there may be a fuller discovery, and the offense notorious, as murder or burglary, and that the evidence, though not sufficient to convict the prisoner, yet gives the court a great and strong suspicion of his guilt, the court may discharge the jury of the prisoner." 2 Hale, P. C. 295.

"Nor is it now a question, nor, I hope, will it ever be a question again, whether in a capital case the court may, in their discretion, discharge a jury after evidence given and concluded on the part of the crown, merely for want of sufficient evidence to convict, and in order to bring the prisoner to a second trial." Foster, J., in Kinloch's Case, Foster, C. L. 30 (1746). See, also, Reynolds v. State, 3 Ga. 53 (1847). Compare People v. Ny Sam Chung, 94 Cal. 304, 29 Pac. 642, 28 Am. St. Rep. 129 (1892); State v. Richardson, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238 (1896); Pizano v. State, 20 Tex. App. 139, 54 Am. Rep. 511 (1886).

[20] Accord: Where juror fraudulently procures himself to be impaneled. State v. Washington, 89 N. C. 535, 45 Am. Rep. 700 (1883). Where a juror becomes too ill during the trial to attend. Gardes v. U. S., 87 Fed. 172, 30 C. C. A. 596 (1898). Where the jury is discharged with consent of defendant. State v. Allen, 46 Conn. 531 (1879). Where defendant himself has made it impossible for a valid verdict to be rendered, or a valid judgment entered against him. People v. Higgins, 59 Cal. 357 (1881). See, also, Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968 (1891).

ANONYMOUS.

(Assizes, 1351. Lib. Ass. 122, pl. 16.)

An indictment for the death of W. White at N. and he alleges a record by which it appeared formerly he was acquitted of the death of W. D. at E. and said that this was the same person, and now offers the record, &c. And other witnesses say that it was the same person. Wherefore it was adjudged that he be acquit, &c.[22]

SIR WILLIAM WITHIPOLE'S CASE.

(Court of King's Bench, 1628. Cro. Car. 147.)

The first day of this Term William Withipole was arraigned upon an indictment of murder found in this vacation in Suffolk before commissioners of oyer et terminer, and certified hither by certiorari; and upon his arraignment he desired to have counsel to plead for him ore tenus, pretending he had matter in law to plead. But THE COURT denied it, unless he would shew to them some exception in law, for which they should see cause to appoint him counsel; and then Mr. Holborn should be assigned for him: and THE COURT said, any other might be, though not assigned.

Afterwards the said Mr. Holborn, being assigned his counsel, moved, that he ought not to be arraigned upon this indictment, because he had been autrefois arraign upon an inquisition of murder found before the coroner, and had pleaded thereto, &c. and so concluded his plea by pleading not guilty to the felony. But it was held by ALL THE COURT, that this was no cause of plea; for where he is not convicted or acquitted, he may be arraigned upon a new indictment. ~~But~~ to avoid that doubt, that he should not be questioned upon both, it was ruled, that the first should be quashed as insufficient. * * * [23]

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[21] Part of this case is omitted.

When defendant obtains a new trial after a conviction of manslaughter, or of murder in some degree less than that of which he might have been convicted on an indictment for murder, the authorities are in conflict on the question whether the conviction of manslaughter was an acquittal of the murder, so as to bar a subsequent indictment for murder on the same facts. See, for the affirmative, People v. McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245 (1903); Rolls v. State, 52 Miss. 391 (1876); State v. Belden, 33 Wis. 120, 14 Am. Rep. 748 (1873). Contra: Reg. v. Tancock, 13 Cox C. C. 217 (1876); Waller v. State, 104 Ga. 505, 30 S. E. 835 (1898); State v. Bradley, 67 Vt. 465, 32 Atl. 238 (1894); State v. Behimer, 20 Ohio St. 572 (1870).

[22] "If the prisoner be now arraigned of a felony by the name of A. B. (by which name, as also by the name of A. C., he is well enough known), then may he say that he was before time acquitted of the same felonie, before such or such justice, by the name of A. B., averring that he is the same person and that he is known by the one and the other calling. Lib. Ass. 26, pl. 15 & 11 H. 4, 93." Lamb. Eirenar. 555.

STATE v. BENHAM.

This is a good case on [illegible] general [illegible]

(Supreme Court of Errors of Connecticut, 1829. 7 Conn. 414.)

WILLIAMS, J.[24] The statute, upon which this information is founded, enacts: "That if any person shall have in possession, or receive from any other person, any forged or counterfeited promissory note or bill, for the payment of money, with intention to utter or pass the same, or to permit, cause or procure the same to be uttered or passed, with intention to defraud any person, or body politic or corporate, knowing the same to be forged or counterfeited; every such person, so offending, being thereof duly convicted, shall suffer imprisonment," etc. St. 157, tit. 22, § 35. The prisoner had in his possession, at one time, several bank notes or bills of different banks, which were taken from him at one time. He has been tried for having one of them in his possession, and convicted; and the question now ~~is~~, whether he can be again tried and convicted for possessing each of the other notes of the different banks, which he had at that time. In other words, is the possession of each bill or note, holden at one and at the same time, a distinct offense, and punishable as a distinct crime?

Until the late revision of our statutes, it was not punishable by statute to have in one's possession forged notes or counterfeited coin. The offense consisted in uttering or putting them off. Now the possession is punishable in the same manner as the offense of uttering them is. But it cannot be supposed that the Legislature intended to punish the offense of possessing such bills or notes, or coin, more severely than the crime of putting them off; or that they should punish the man, who barely intended to defraud, but had not yet offered to, more severely than the one who had put that intent into execution. And if Benham had put off these two notes to one person, at one time, it cannot be claimed that he could be convicted of more than one offense. And yet it is claimed that having them in his possession, although he has never offered to put them off, he may be punished for more than one offense.

In support of this it is said that the notes are issued by different banks, and the intent charged is to defraud the two different banks specified, viz., the Troy Bank and the Mechanics' Bank, as well as the persons to whom the notes might be put off. If a charge of defrauding the several banks constitutes two distinct offenses, then the offense of uttering these two notes to the same person, at the same time, would be two offenses; because the intent might properly be charged as an intent to defraud each of the banks, as well as the persons to whom they were put off.

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[23] Part of this case is omitted.

[24] The statement and the arguments of counsel are omitted.

But, as in that case, the putting off a note, with intent to defraud the persons to whom it was put off, would be sufficient to convict, whether there was any attempt to defraud the bank or not, as was recently decided in England, by the twelve judges; so in this case, as it is charged in both informations that the intention was to defraud the persons to whom the notes might be put off, that would be sufficient to justify the conviction; and all that is necessary to constitute the identity of the offense is that the same evidence would convict. Here the same evidence of possession exists in both cases; the same general attempt to defraud the persons to whom they may be passed. The act of possessing the several notes, then, must be one and the same offense, as much as the act of stealing a number of articles, at the same time and place.

It was admitted in argument that he who had counterfeit coins in his possession could not, under the thirty-second section, be punished, as for distinct offenses, for each piece of counterfeit coin he might have. The offense is, certainly, of the same character with this; and it is difficult to believe that the Legislature intended to punish them in so different a manner. It is true that in that section the statute speaks of gold and silver coins; but it will hardly be contended that if a person has a single counterfeit eagle in his possession, with intent to pass it knowing that it is counterfeit, he is not within the statute. The difference in phraseology, therefore, it is believed, will make no difference in the construction. The object of the Legislature, in both cases, is to prevent a person from altering or having in his possession base money. And it has been decided that a person indicted for stealing nine one pound notes, may be convicted upon proof of stealing only one. Rex v. Johnson, 3 Mau. & Selw. 539, 548; Rex v. Clark, 1 Brod. & Bing. 473. There the substance of the offense is stealing notes; here the substance of the offense is having in possession counterfeit bills or notes. The number may add to the evidence of guilt, but not to the number of the offenses. In an action for the penalty for insuring tickets in the lottery, where ten tickets were insured at one and the same time, Lord Kenyon held that but one penalty could be recovered. Holland q. t. v. Duffin, Peake's Ca. 58.

This information might have specified each note which the prisoner had in his possession, as was done in several cases cited in King v. Sutton, Ca. tem. Hardw. 372. Had that been done, it would hardly be claimed that there could have been several punishments. The offense, then, is one and the same offense.

Another objection was made to the plea, but not much insisted on, that, if this is the same offense, it is not pleaded so as to avail the defendant. The plea is that a verdict was rendered, and judgment now impends. And here it must be admitted that a previous acquittal, conviction, or attainder is a good bar; but what shall be the evidence of such conviction is the inquiry.

That a person had been arraigned for the same offense was early held to be no bar to a subsequent indictment. Withipole's Case, Cro. Car. 147. Nor that a nolle prosequi had been entered by the attorney for the government. Commonwealth v. Wheeler et al., 2 Mass. 172.[25] Nor that the jury had been discharged, at the request of the prisoner. Rex v. Kinlock, 1 Wils. 157. Nor even where the jury have been discharged because they could not agree, without consent of the prisoner. State v. Woodruff, 2 Day, 504, 2 Am. Dec. 122; People v. Olcott, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168. Nor can the pendency of another indictment be pleaded in abatement, as it may in a case of a prosecution for a penalty. Rex v. Stratton, Doug. 240; Regina v. Goddard et al., 2 Ld. Raym. 930, s. c. 3 Salk. 171. Nor can a conviction or an acquittal be pleaded, if the former indictment was not sufficient to authorize punishment, if a conviction had ensued. King v. Taylor, 3 B. & C. 502; 4 Co. 45; 1 Chitt. Cr. L. 462. And it has been said that if the defendant remains after conviction, without requesting judgment, or praying for clergy, he could not plead such conviction to a new indictment. 2 Hale's P. C. 252; Stark. C. L. 364.

That no one, however, shall be put in jeopardy twice for the same offense, is a universal maxim (4 Bla. Comm. 329), thought worthy to be incorporated, to a certain extent, into the Constitution of the United States. And that an acquittal or conviction, by a court having jurisdiction, on a sufficient indictment or information, is in all cases whatsoever a bar, is equally clear. 2 Hawk. P. C. bk. 2, c. 30, § 1; 2 Leon. 161. Still the question returns, what is sufficient evidence? Is it the verdict, or the verdict and judgment? It is said by Chitty that there must be a legal acquittal by judgment upon trial, by verdict of a petty jury, or by battle. 1 Chitt. C. L. 457. Tucker, in his notes to Blackstone, says the plea must state the indictment, arraignment, plea, and judgment legitimo modo. 4 Bla. Comm. 336, by Tucker. And in the forms of pleading a judgment is set out, or that the defendant has had his clergy. Stark. C. L. 352. And the general rule certainly is that a verdict without a judgment is not evidence, as it may be arrested. The record of the judgment, therefore, must be adduced, to exclude a witness. Swift's Ev. 18; 1 Stark. Ev. 183, 246; 2 Stark. Ev. 716;

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[25] Contra: Where the nolle prosequi has been entered after the jury has been impaneled. Reynolds v. State, 3 Ga. 53 (1847); U. S. v. Farring, 4 Cranch, C. C. 465, Fed. Cas. No. 15,075 (1834). Unless the nolle prosequi was entered because the indictment was insufficient to warrant a conviction. Walton v. State, 3 Sneed (Tenn.) 687 (1856). Or because of a material variance. Martha v. State, 26 Ala. 72 (1855).

"There is, in point of law, a difference between the plea of autrefois convict, and autrefois attaint of the same offense. The former may be where there has been no judgment; the latter is founded upon a judgment." Story, J., in U. S. v. Gilbert, 2 Sumn. 40, Fed. Cas. No. 15,204 (1834).

Lee v. Gansel, Cowp. 3; Commonwealth v. Green, 17 Mass. 537. So proof of conviction of the principal, on the trial of the accessory, must be by judgment upon a verdict or confession, or by outlawry. 4 Co. 43; Goff v. Byby et al., Cro. Eliz. 540.

On the other hand, it is said, in 4 Bla. Comm. 335, that when one is found not guilty, on an indictment or other prosecution, he may plead such acquittal in bar of any subsequent prosecution. And an acquittal has been held sufficient to entitle bail to their discharge before judgment is entered. Rex v. Spenser, 1 Wils. 315. And in the case of Queen v. Goddard, 2 Ld. Raym. 921, s. c. 3 Salk. 172, Holt, C. J., says that another indictment pending could not be pleaded in abatement, even after the accused had been found guilty upon it, but it must be pleaded in bar. And Judge Dane, after citing an authority to show that a judgment is necessary, makes a quære; for, says he, when the defendant has once stood trial for his life, he has been clearly once in jeopardy, though there has been no judgment or clergy. 6 Dane's Abr. 531. And in Brooke's Case, 4 Co. 40, after verdict of guilty, on an appeal and motion in arrest, on an indictment at the suit of the king, it was claimed that the defendant could not be charged again, and it was resolved that, "if the count had been sufficient, then being convicted at the suit of the party, he should not be again convicted at the suit of the king; and the same principle is recognized, in Vaux's Case, 4 Co. 45. 1 Chitt. C. L. 462, 464, et seq. Had not a verdict been sufficient, it is not easy to see how the sufficiency of the count came to be considered. And in Withipole's Case, Cro. Car. 147, the court quashed one of two indictments, lest the prisoner should be questioned on both. And in Rex v. Kinlock, 1 Wils. 157, Wright, J., against the other judges, held that to call a new jury would be to put the prisoner twice in jeopardy, although the former jury was discharged at his request; and upon report thereof the prisoner was pardoned.

An accessory may be put upon trial before judgment against the principal, but cannot be sentenced until after judgment against the principal, as in the recent Case of Elsie Whipple, 9 Cow. (N. Y.) 707. And in a civil case, where a judgment was not rendered, but a verdict taken before a justice was pleaded in bar, it was held a valid bar, as the justice could not arrest the judgment or grant a new trial. Felter v. Mulliner, 2 Johns. 181.

When, then, we consider the extreme jealousy which the common law evinces on this subject, supported by the provisions of the Constitution; when we find no case where a prosecution has been sustained after verdict upon a different count, and amidst so much doubt whether the legal principle as to the necessity of a judgment has been extended to cases of this kind; when we further find that both these prosecutions are in the same court, and no claim is made that judgment cannot be rendered upon the first verdict—I think the more correct rule to adopt is that under such circumstances a second information ought not to be supported, although judgment had not been actually entered upon the first at the time of pleading.

I would, therefore, affirm the judgment of the superior court.

The other Judges were of the same opinion; PETERS, J., doubting.

Judgment affirmed.

CHAMPNEYS' CASE.

(York Assizes, 1837. 2 Lew. 52.)

The prisoner, Champneys, was indicted as principal for delivering in a false schedule to the Insolvent Court, and the others for aiding and abetting him.[26]

Cottingham, for Champneys, pleaded ore tenus autrefois acquit, as to a part of the goods alleged to have been omitted from the schedule.

* * *

Cottingham then proposed to give in evidence, to support the remainder of the plea, a draught copy of the former indictment; but the counsel for the prosecution objected to this, as the indictment itself might be produced. He, however, offered to waive the point if the prisoner's counsel would undertake to say that it had been examined with the original and was a true copy.

PATTESON, J., concurred in the objection, observing that an examined copy would answer all the purposes of the record itself, but that without one or the other the evidence failed.

Cottingham then pressed upon the attention of the court the former acquittal of Champneys, contending that an acquittal as to a part was good for the whole, as it involved the question of a false schedule, which was the gist of the offense.

Sir G. A. Lewin replied, that a man might well be acquitted as to some articles and not as to others, and that it was obvious, where fraud was intended, that concealment as to some might precede that of others.

PATTESON, J. If the articles, or any of them, are different, I am bound to proceed; but, if the offense should turn out to be substantially the same as that the prisoner has already been acquitted of, I shall recommend the jury to acquit. Whether at the former trial the proper evidence was adduced before the jury or not is wholly immaterial; for if, by any possible evidence that could have been adduced, he could have been convicted on that indictment, he is now entitled to an acquittal.

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[26] Part of this case is omitted.

ROBERTS v. STATE.

(Supreme Court of Georgia, 1853. 14 Ga. 8, 58 Am. Dec. 528.)

The defendants, with others, were indicted for a robbery committed upon John Jackson, of said county. At March term, 1853, they filed a plea setting forth the record of a former indictment against them for burglary, upon which they had been tried and convicted, and which they averred to be the same felony, and none other, for which they were now indicted. To this plea, the Solicitor General in writing demurred, denying its sufficiency in law to operate the acquittal of the defendants. Upon consideration of such demurrer, the plea was overruled by the court, and the defendants required to answer over.[27]

* * *

STARNES, J., delivered the opinion. * * *

The main fact stated, and on which the plea rested, was that the defendants had been previously convicted on the charge of burglary, that judgment had been rendered on said conviction, and that the felony of which they had been so convicted was one and the same with the felony of which they then stood accused. Of course, the Solicitor, by so demurring, and admitting that this charge of robbery was the same felony as that of which the defendants had been convicted, intended only to admit that the two indictments related to the same transaction, and did not mean to admit that the charge was the same in each case. Taking this, then, as true, it becomes our duty to make the following inquiry: When a prisoner has been indicted for having burglariously broken and entered the dwelling of another with intent to steal the goods and chattels of the owner, and, in order to manifest such intent on the trial, proof be adduced that the prisoner did violently, or by intimidation from the person of the owner, steal such goods and chattels, and he be convicted, and afterwards an indictment for the robbery committed at the time be found against him, can he then be tried, if he plead autrefois convict, for such robbery as a separate offense?

The case made by this record invokes an answer from us to this question. The record, it is true, does not show that, upon the trial of these defendants for the burglary, that part of the evidence which was relied upon to show the felonious intent was the same with that which was offered upon the trial for robbery; but this is in effect admitted by the demurrer to the plea, as we have shown, and thus the question presented arises.

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[27] Parts of the statement and opinion are omitted.

"An acquittal of the charge of larceny of certain goods is not a bar to an indictment for the larceny of certain other goods, although the last-mentioned goods are of such a character that the language of the first indictment might describe them." Per Curiam, in Commonwealth v. Sutherland, 109 Mass. 343 (1872).

Of the sufficiency of the plea of former acquittal or conviction, the following is said to be a true test, viz.: Whenever the prisoner might have been convicted on the first indictment, by the evidence necessary to support the second; or, in other words, where the evidence necessary to support the second indictment would have sustained the first. Arch. C. P. 106; Rex v. Clark, 1 B. & B. 473; People v. Barrett, 1 Johns. (N. Y.) 66; Com. v. Cunningham, 13 Mass. 245; Hite v. State, 9 Yerg. 357; People v. McGowan, 17 Wend. 386; State v. Risher, 1 Rich. Law, 222; Durham v. People, 4 Scamm. 172; Com. v. Wade, 17 Pick. 400; 2 Hawks, 98.

This may be said to be the case in all compound felonies. 1 Ross on C. 89, note.

There seems to be some difficulty in applying this rule (as above expressed) in all cases. It may be said that the prisoner could not have been convicted on the indictment for burglary, by the proof necessary to convict on the indictment for robbery; and the evidence necessary to support the indictment for robbery would not have insured a conviction on the prosecution for burglary. If the indictment for robbery, however, had been first tried, then, upon the trial of the burglary, the proof necessary to support that last trial would have been such as would have been sufficient to sustain the first prosecution, because, after proof of the breaking and entering by the prisoner, the state would have proceeded to prove the violent stealing from the prosecutor, in order to show the breaking, etc., with felonious intent; and this would have been proof of the robbery.

To avoid any confusion on this subject, we adopt the rule as it is otherwise more generally, and perhaps more accurately, expressed, viz., that the plea of autrefois acquit or convict is sufficient, whenever the proof shows the second case to be the same transaction with the first. Fiddler v. State, 7 Humph. (Tenn.) 508; Thach. 206, 207. That rule is decisive of this case. * * *

The rule above stated by me is that which is prescribed for this case, and it must be the law for these defendants.

This record shows that the transaction referred to in the indictment for burglary is the same with that in the prosecution for robbery, inasmuch as the pleader, in order to show the felonious intent, has made it necessary in the former to prove the circumstances of the stealing, and thus to involve the same transaction (the robbery) in both cases. If the pleader had alleged the breaking with felonious intent (which constitutes burglary), and had been able to prove, otherwise than by proof of the robbery, that the felonious intent was manifested, then the two might not have constituted the same transaction. But this was settled by the demurrer; and the state's counsel, having elected to make his proof of felonious intent in this way, has put his case within the application of the rule.

In passing sentence upon these defendants, after the conviction in the case of burglary, the court no doubt graduated the penalty according to the circumstances of the transaction, thus taking into consideration the proof of the robbery; for it is to be presumed that a breaking and entering of a dwelling house, accompanied by an actual robbery, would have been more severely punished than a breaking and entering with an intent to rob which was not consummated. If this be so, and the defendants have been held to some degree of punishment in consideration of the robbery, to try them again for it would be, as it were, to place them in jeopardy a second time on account of the same offense, thus in some sort violating the fundamental principle on which the plea of autrefois acquit and convict rests. Hence, again, the propriety of the rule which we recognize and apply.

On this ground, we reverse the judgment of the court. * * *

STATE v. ROSENBAUM.

(Appellate Court of Indiana, 1899. 23 Ind. App. 236, 55 N. E. 110, 77 Am. St. Rep. 432.)

Robinson, J. Appellee was indicted for permitting a person named to be and remain in his place of business during prohibited hours, contrary to the provisions of section 3 of the act of March 11, 1895 (Acts 1895, p. 248). Appellee pleaded in abatement, setting up a former indictment and acquittal, that the person named in the present indictment as having been in the saloon was in company with the person named in the former indictment, and that the acts complained of in the present indictment are identical with those complained of in the former indictment, of which he had been acquitted. A demurrer to this plea was overruled, and upon this ruling the appeal is based.

The question presented is, can the proprietor of a place where liquors are sold, who permits two or more persons at the same time to be in the room during prohibited hours, be prosecuted for a separate offense as to each of such persons? The Attorney General, in his brief, states that he is of the opinion that the question must be answered in the negative. In Smith v. State, 85 Ind. 553, the court said: "The true test to determine the sufficiency or insufficiency of a plea of former acquittal as a bar to the pending prosecution is this: Would the same evidence be necessary to secure a conviction in the pending, as in the former, prosecution? If it would, then the plea of former acquittal would be a complete bar to the pending prosecution; otherwise, the plea would not be sufficient." The case of State v. Elder, 65 Ind. 282, 32 Am. Rep. 69, states the following rule: "When the facts constitute but one offense, though it may be susceptible of division into parts, as in larceny for stealing several articles of property at the same time, belonging to the same person, a prosecution to final judgment for stealing a part of the articles will be a bar to a subsequent prosecution for stealing any other part of the articles stolen by the same act.” See, also, State v. Gapen, 17 Ind. App. 524, 45 N. E. 678, and 47 N. E. 25; Davidson v. State, 99 Ind. 366; Fritz v. State, 40 Ind. 18; Wininger v. State, 13 Ind. 540; Brinkman v. State, 57 Ind. 76. The statute makes it unlawful for the proprietor to permit “any person or persons other than himself and family” to go into the room at prohibited times.

In the case at bar the crime committed was permitting “persons other than himself to go into such room” during prohibited hours. It was a single offense, which cannot be split up and prosecuted in parts. “A prosecution for any part of a single crime bars further prosecution based upon the whole or a part of the same crime.” ? Laupher v. State, 14 Ind. 327. The appeal is not sustained.[28]

MOREY v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts, 1871. 108 Mass. 433.)

Writ of error to reverse the judgment of the superior court upon a conviction of the plaintiff in error on an indictment for adultery. Plea, in nullo est erratum.

The record showed that at September term, 1867, of the superior court in Norfolk, two indictments were found against the plaintiff in error, the first for lewd and lascivious cohabitation, and the second for adultery. The first indictment charged that he and Bridget Kennedy, on October 1, 1866, and “from that day continually to” August 1, 1867, at Quincy, “did lewdly and lasciviously associate and cohabit together,” they “not being then and there married to each other.” The second charged, in three counts, that on January 1, June 1, and August 1, 1867, respectively, at Quincy, he committed adultery with Bridget Kennedy, he “being then and there a married man and then and there having a lawful wife alive other than the said Bridget Kennedy,” and he and said Bridget “not being then and there lawfully married to each other.”

The record further showed that at said term, he and Bridget Kennedy were tried together on the first indictment, and found guilty, and he was sentenced thereon to confinement at hard labor in the House of Correction for two years, and that at the same term he was tried and found guilty on the second indictment, and sentenced thereon to confinement at hard labor in the House of Correction for three years, “this sentence to take effect from and after the expiration of his previous sentence at this term of the court.”

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[28] See, also, Ball v. State, 67 Miss. 358, 7 South. 353 (1889); State v. Ross, 4 Lea (Tenn.) 442 (1880); Irvin v. State, 7 Tex. App. 78 (1879).

A statute providing for an increased penalty for a second conviction for crime is not invalid, as putting the offender twice in jeopardy for the same offense. State v. Le Pitre, 54 Wash. 166, 103 Pac. 27 (1909).

The assignment of errors was that the sentence on the second indictment was wrongful, in that the plaintiff in error "had been previously convicted and sentenced to two years' confinement in said House of Correction for the same acts for which this sentence was awarded."

H. L. Hazelton, for the plaintiff in error. C. Allen, Attorney General, for the Commonwealth.

Gray, J. A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

An acquittal or conviction upon an indictment for murder is a bar to a subsequent conviction upon an indictment for manslaughter or assault by the same act by which the murder was charged in the first indictment to have been committed, because such a conviction might have been had upon the first indictment. And so, e converso, an acquittal or conviction of the manslaughter is a bar to a subsequent indictment for the murder. Commonwealth v. Roby, 12 Pick. 496, 504, 505, and authorities cited; 1 Stark. Crim. Pl. (2d Ed.) 323, 324; 2 Russell on Crimes (4th Ed.) 55–59; Rev. St. c. 137, § 11; Gen. St. c. 172, § 16; Commonwealth v. Drum, 19 Pick. 479; Commonwealth v. Squire, 1 Metc. 258, 262; Commonwealth v. Lang, 10 Gray, 11; Commonwealth v. Squires, 97 Mass. 59.

On the other hand, a conviction of an assault with intent to murder was held by this court to be no bar to an indictment for murder, before our statutes permitted a conviction of such an assault upon an indictment for murder. Commonwealth v. Roby, 12 Pick. 496; St. 1805, c. 88, § 2; Rev. St. c. 137, § 11, and commissioners' note; Gen. St. c. 172, § 16.

A conviction of being a common seller of intoxicating liquors has been held to bar a prosecution for a single sale of such liquors within the same time, upon the ground that the lesser offense, which is fully proved by evidence of the mere fact of unlawfully making a sale, is merged in the greater offense; but an acquittal of the offense of being a common seller does not have the like effect. Commonwealth v. Jenks, 1 Gray, 490, 492; Commonwealth v. Hudson, 14 Gray, 11; Commonwealth v. Mead, 10 Allen, 396.

It has also been repeatedly held that the offenses of keeping a tenement used for the illegal sale and illegal keeping of intoxicating liquors, of illegally selling such liquors, and of doing secular business on the Lord's day, are distinct offenses, and a conviction of the one is no bar to a conviction of either of the others, although the same acts of sale are relied on in proof of each. Commonwealth v. Bubser, 14 Gray, 83; Commonwealth v. Shea, 14 Gray, 386; Commonwealth v. Cutler, 9 Allen, 486; Commonwealth v. O'Donnell, 8 Allen, 548; Commonwealth v. Trickey, 13 Allen, 559; Commonwealth v. Hogan, 97 Mass. 122; Commonwealth v. Sheehan, 105 Mass. 192.

The case now before us cannot be distinguished in principle from those just cited. The indictment for lewd and lascivious cohabitation contained no averment and required no proof that either of the parties was married, but did require proof that they dwelt or lived together, and would not be supported by proof of a single secret act of unlawful intercourse. Commonwealth v. Calef, 10 Mass. 153. The indictment for adultery alleged and required proof that the plaintiff in error was married to another woman, and would be satisfied by proof of that fact and of a single act of unlawful intercourse. Proof of unlawful intercourse was indeed necessary to support such indictment. But the plaintiff in error could not have been convicted upon the first indictment by proof of such intercourse and of his marriage, without proof of continuous unlawful cohabitation; nor upon the second indictment by proof of such cohabitation, without proof of his marriage. Full proof of the offense charged in either indictment would not, therefore, of itself have warranted any conviction upon the other. The necessary consequence is that, assuming that proof of the same act or acts of unlawful intercourse was introduced on the trial of both indictments, the conviction upon the first indictment was no bar to a conviction and sentence upon the second, and that there is no error in the judgment for which it can be reversed.

The question of the justice of punishing the offender for two distinct offenses growing out of the same act was a matter for the consideration of the grand jury and the attorney for the commonwealth in the presentment and prosecution, of the court below in imposing sentence, or of the executive in the exercise of the pardoning power. It is not within the jurisdiction of this court as a court of error.

Judgment affirmed.

FAULK v. STATE.

(Supreme Court of Alabama, 1875. 52 Ala. 415.)

Brickell, C. J.[29] A plea of former acquittal and of not guilty should not be interposed at the same time. The plea of former acquittal should contain a protestation of innocence, and should precede a plea of not guilty. This last plea is not necessary, if the first prevails. 1 Bish. Cr. Pr. §§ 577, 578. If the two pleas are tendered together, they should not be submitted to the jury at once, but the court should order the special plea passed upon first. Id. If the plea is determined against the defendant, he is allowed to plead over, and to have his trial for the offense itself. 1 Whart. Am. Cr. Law, § 578. On an indictment for a misdemeanor, if the defendant interposes the plea of autrefois acquit or autrefois convict, and the plea of not guilty, at the same time, and without objection proceeds to trial on both, he waives the irregularity, and if the jury pronounce on both pleas, he cannot take advantage of it. Dominick v. State, 40 Ala. 680, 91 Am. Dec. 496.[30] In a case of felony the rule is different. The failure to make objection to the trial of both issues at the same time is not a waiver of the irregularity, and advantage of it may be taken in arrest of judgment, or on error. Foster v. State, 39 Ala. 229.

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[29] Part of this case is omitted.

The appellants were charged with felony, and by consent of the state pleaded at the same time, by the mere titles of the pleas, "former acquittal," and "not guilty." They inquired whether the court would not try the issue of former acquittal first. The court declined to express an opinion, but said the defendants could do as they wished about trying both issues together. It was for them to determine. It might not be best for them, but the court, if they wished, would first try the plea of former acquittal. The defendants then agreed that both issues should be submitted to the jury, and the trial proceeded. After the evidence on both issues had been closed, the defendants objected to the trial of them at the same time. The court inquired if the defendants objected to the jury, which had been impaneled and had heard the evidence, trying first the plea of former acquittal and then the plea of not guilty. The defendants objected, and the court directed the trial on both pleas to proceed, to which defendants excepted.

The court should of its own motion have directed a trial first of the plea of former acquittal, without an application from the defendants, or inquiring from them as to whether that course should be pursued. Nor do we see the propriety of the intimation that it would or might be best for the defendants that both issues should be tried at once. The action of the defendants should not have been influenced by such an intimation, and it is difficult to conceive the injury which would result to them from a separate trial of the issues. Though the defendants consented to the trial of both issues, the consent was given under the pressure of the intimation that this course was best for them, and it should not be regarded as a waiver by them of the irregularity. This error would operate a reversal of the judgment; but the evidence offered in support of the plea is wholly matter of record, consisting of a judgment of conviction (but for what offense does not appear) at the Spring term, 1874, of the circuit court of Pike county, and a judgment sustaining a demurrer to an indictment against the defendants at the Fall term of said court. Neither indictment was offered in evidence, nor any evidence offered that they were for the same offense charged in the present indictment. To support a plea of former acquittal or former conviction, it is not sufficient simply to put in the record, even when it embraces the indictment on which judgment is pronounced. Evidence must be given that the offenses charged in the present and former indictment are the same. 1 Bish. Cr. Pr. § 581. The record of the judgment of conviction did not tend to support the plea of former acquittal; and the record of the judgment on the demurrer to the indictment, and quashing it, was not in any sense a judgment of acquittal, barring another prosecution. Rev. Code, § 4146. There was no pretense for the plea, and the error of submitting it to a trial with the plea of not guilty was not injurious to the appellants. If the plea of former acquittal had been drawn in full, instead of being pleaded by its title, and had stated the judgment on the demurrer as the judgment of acquittal relied on, it would have been a mere nullity, which could have been stricken out on motion. * * *

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[30] "The defendant pleaded not guilty and former acquittal. The jury returned a verdict of guilty, but did not find upon the plea of former acquittal. There must be a verdict upon that, as upon the plea of not guilty, before there can be a judgment of conviction." Per Curiam, in People v. Helbing, 59 Cal. 567 (1881).

Accord: Moody v. State, 60 Ala. 78 (1877).

There is no error in the record prejudicial to the appellants, and the judgment must be affirmed.[31]

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[31] Compare Reg. v. Charlesworth, 9 Cox, C. C. 40 (1861); Commonwealth v. Merrill, 8 Allen (Mass.) 545 (1864); State v. Johnson, 11 Nev. 273 (1876); People v. Helbing, 59 Cal. 567 (1881).

"Counsel for appellant argue the question of 'once in jeopardy'; but that question can arise only after an issue has been made by a plea of 'once in jeopardy.'" McFarland, J., in People v. Lee Yune Chong, 94 Cal. 387, 29 Pac. 778 (1892).

Accord: Pitner v. State, 44 Tex. 578 (1876). Compare Bryant v. State, 72 Ind. 400 (1880).

CHAPTER XII

TRIAL

SECTION 1.—RIGHT TO TRIAL BY JURY

whether it can be waived. seems to turn largely on specific wording as to not necessarily applicable for summary offenses, & misdemeanors [illegible] though can be waived even in felony.

Before the abolition of the ordeal in 1215 the justices, having received the statement of the hundred jurors, turn to the representatives of the four neighboring vills, who at this point are sworn to make true answer. If these villani agree with the hundredors in declaring that the person in question is suspected of a felony, then he goes to the water. * * * As we read the Rolls and Bracton's text, what normally happens is this: The hundred jury, without being again sworn —it has already taken a general oath to answer questions truly—is asked to say in so many words whether this man is guilty or no; if it finds him guilty then "the four townships" are sworn and answer the same question. If they agree with the hundredors, sentence is passed.

Pollock & Mait. Hist. Eng. Law, II, 644.

So far as we can see, if the justices in eyre receive a presentment of any of the minor offenses, they give the incriminated person no chance of denying his guilt, but at once declare him to be "in mercy." If, for example, the jurors present that J. S. has broken the assize of wine, then J. S. is put in mercy; and so, if he is said to have "fled for" a crime of which he was not guilty, a forfeiture of his chattels is decreed.

We believe that in Henry III.'s day anything that we could call the trial of a man upon an indictment for misdemeanor was exceedingly rare. Slowly, when the procedure in cases of felony was well established, the doctrine gained ground that the person charged with an offense punishable by imprisonment might traverse the presentment of the jurors and "put himself" upon the country; but, so long as many of the minor misdeeds were punished by amercement in the old local courts, there were many presentments that were not traversable.

Id. 649, 650.

It seems to have been possible, even before the decree of the Fourth Lateran Council, in this same year of 1215, to apply the jury to criminal cases whenever the accused asked for it. But how if he did not ask for it? * * * There was an unsettled time at first, and some persons were tried by jury and hanged who never had consented to the jury. There was ground for this course in the usages of the king's court in both civil and criminal cases. * * * As we saw in Glanville, one might be compelled to the ordeal against his will. In the nature of things it could not really be left to the option of an accused person whether he would be tried or not. It is not strange then to find that the judges, using the large discretion confided to them by the crown after the Lateran Council, sometimes forced a jury upon an unwilling prisoner. * * *

Down, then, to the middle of the thirteenth century, or later, it seems to have been thought possible by high authority, as well in criminal cases as in civil, to try a man by jury, or, at any rate, to convict him, whether he consented or not. But the doctrine was contrary to settled ideas, it was not an established one, the precedents were few, and it was supported rather on analogy than any body of direct authority. An obvious course, in case of refusal, was that of treating the party as confessing. There had, indeed, always been cases where one was hanged without any trial at all, as where a man was taken in the fact.

Thayer, Evidence at the Com. Law, 68.

COLLINS v. STATE.

(Supreme Court of Alabama, 1889. 88 Ala. 212, 7 South. 260.)

The indictment in this case was found in the circuit court of Barbour, at the June term, 1889, and charged that the defendant "did make use of abusive, insulting, or obscene language, in the presence or within the hearing of Mary Davis, a female." At the end of the term, the case was transferred, with others, by order of the court, to the county court, under the provisions of the act approved February 20, 1889. Sess. Acts 1888–89, pp. 501–508. * * *

Somerville, J.[1] The controlling point of contention in the present case is the alleged unconstitutionality of the act approved February 20, 1889, entitled "An act to regulate the trials of misdemeanors in Barbour county." Acts 1888–89, pp. 501–508. This statute confers on the county court of Barbour county jurisdiction of all misdemeanors committed in that county, and provides for the transfer to that tribunal of all indictments pending and untried in the circuit court on the day of adjournment of any term, and regulates in detail the procedure authorized to be adopted on such trials. The vital objection urged to the act is that it expressly provides for the trial of such cases by a jury of only eight persons, instead of twelve, and authorizes an appeal upon conviction directly to the Supreme Court only, thus depriving the defendant of his constitutional right of trial by jury.

The Constitution of Alabama declares that "the right of trial by jury shall remain inviolate," and in all prosecutions by indictment that the accused shall have "a speedy public trial, by an impartial jury" of the county or district in which the offense was committed. Const. 1875, art. 1, §§ 7, 12. It does not admit of controversy that the jury contemplated by these clauses of the Constitution is a common-law jury of twelve men, and that a jury constituted of a less number than this is not a constitutional jury. Iron Co. v. Cabaniss, 87 Ala. 328, 6 South. 300; Cooley, Const. Lim. (5th Ed.) 391; Sedg. St. & Const. Law (2d Ed. Pom.) 493, and note; Steamboat Co. v. Roberts, 48 Am. Dec. 178, 193, note; Wynehamer v. People, 13 N. Y. 378; Work v. State, 2 Ohio St. 296, 59 Am. Dec. 671; Vaughn v. Scade, 30 Mo. 600; State v. Kaufman, 1 Crim. Law Mag. 57, note 61.

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[1] Part of this case is omitted

There are cases, it is true, where the general assembly is constitutionally authorized to dispense with a grand jury, and to authorize by law the prosecution of certain misdemeanors before justices of the peace and other inferior courts. Const. 1875, art. 1, § 9. And in such case, the statute authorizing the waiver of jury trial by the defendant, after transfer of an indictment for misdemeanor to an inferior court, has been held to be free from constitutional objection. Connelly v. State, 60 Ala. 89. So, where a right of appeal is secured to a higher court, with a right of trial there by a common-law jury, the right may even thus be practically preserved. Sedg. St. & Const. Law (Pom. 2d Ed.) 491. This case falls within none of these exceptions or modifications of the general rule under discussion.

A close inspection of the statute under consideration leaves no doubt as to what was the legislative intent as to the composition of the only kind of jury authorized to be organized under its provisions. It is a jury of eight persons, and none other. It is declared that, "if a jury is demanded, the court shall make an entry thereof on the record, and proceed as herein provided;" meaning thereby in the mode prescribed by the act. Acts 1888–89, p. 502, § 6. It is thereupon provided that the petit juries "shall consist of two panels, of eight men each, and shall be selected as herein provided," but may be impaneled under the general law. So the authority to order special venires, and select tales jurors, under the general jury law as it stands in the Code, is coupled with the limitation, "except as modified by this act." Page 507, § 24. And again, the general jury law is declared applicable, "except as modified or repealed by this act."

A guarded caution is thus manifest that the authority of the county court to organize juries shall be limited to juries composed of eight persons. The intention to exclude the power to increase the number to twelve is as clear as language can make it, short of express prohibition. By necessary implication, we are driven to the conclusion that the jurisdiction attempted to be vested in this court embraced the power to organize but one sort of jury, and that is a jury of eight men. This feature of the law, under the authorities cited above, is palpably unconstitutional.

Striking out the section authorizing the organization of these imperfect juries as void, and we have an act authorizing the trial of a defendant on an indictment, without providing for a trial by jury in any mode, either directly by the court on which jurisdiction is conferred, or by appeal to another tribunal in which the right is secured. This was not the legislative intention, and, if it were, the act is repugnant to the clauses in the declaration of rights above cited, which provide for a jury trial by twelve men in all prosecutions by indictment, and the purpose of which was to preserve the right inviolate. In this view of the case, under the authorities, the whole act must fall. Railroad Co. v. Morris, 65 Ala. 198; Powell v. State, 69 Ala. 13; Stewart v. Commissioners, 82 Ala. 209, 2 South. 270; Allen v. Louisiana, 103 U. S. 80, 26 L. Ed. 318; Ex parte Roundtree, 51 Ala. 42; Elsberry v. Seay, 83 Ala. 614, 3 South. 804.

The judgment must be reversed. * * *

BYERS v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1862. 42 Pa. 89.)

STRONG, J.[2] The plaintiffs in error having been convicted, and committed under an act of assembly passed March 13, 1862, sued out a habeas corpus and this certiorari, and their first assignment of error brings in question the constitutionality of the act under which the conviction took place. The act is contained in two sections. By the first it is enacted that "if any person shall be charged on oath or affirmation, before the mayor or police magistrate of the central station of the city of Philadelphia, with being a professional thief or pickpocket, and who shall have been arrested by the police authorities at any steamboat landing, railroad depot, church, banking institution, broker's office, place of public amusement, auction-room, store, or crowded thoroughfare in the city of Philadelphia, and it shall be proven to the satisfaction of the said mayor, or police magistrate appointed by the mayor for the central station, by sufficient testimony, that he or she was frequenting such place or places for an unlawful purpose, he or she shall be committed by the said mayor or said police magistrate, to the jail of the county of Philadelphia, for a term not exceeding ninety days, there to be kept at hard labor; or, in the discretion of the said mayor or police magistrate of said central station, he or she shall be required to enter security for his or her good behavior for a term not exceeding one year." The second section gives to any person who may feel aggrieved at any such act, judgment, or determination of the mayor or police magistrate, the right to apply to any judge of the court of quarter sessions for a writ of habeas corpus, and directs that on the return thereof there shall be a rehearing of the evidence, and empowers the judge either to discharge, modify, or confirm the commitment.

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[2] Part of this case is omitted.

It is insisted that this act is repugnant to that clause in the declaration of rights in the Constitution which guarantees "that trial by jury shall be as heretofore, and the right thereof remain inviolate." The objection is based upon a misconception of what that right of trial by jury was which is protected by the Constitution. The founders of this state brought with them to their new abode the usages to which they had been accustomed in the land from which they emigrated. Among them was trial by jury. That mode of trial had long been considered the right of every Englishman, and it had come to be regarded as a right too sacred to be surrendered or taken away. Even in England it was fundamental or constitutional, so far as any right can be where there is no written frame of government. Its extent and its privileges, how and when it was to be enjoyed, were perfectly understood, and in bringing it with them the founders of the commonwealth doubtless intended to bring it as they had enjoyed it. None of the frames of government or Constitutions under which we have lived have contemplated any extension of the right beyond the limits within which it had been enjoyed previous to the settlement of the state or the adoption of the Constitution. No intention to enlarge it appears in the laws agreed upon in England in 1682. Our first Constitution, that of 1776, declared that "trials by jury shall be as heretofore." The Constitution of 1790, and the amended one of 1838, adopted substantially the same provision. Their language was: "Trial by jury shall be as heretofore, and the right thereof remain inviolate." All looked to preservation, not extension. It is the old right, whatever it was, the one previously enjoyed, that must remain inviolable, alike in its mode of enjoyment and in its extent.

What, then, was this right thus cherished and thus perpetuated? We inquire not now after the mode in which such a trial was conducted. Our business at present is to ascertain how far the right to a trial by jury extended—to what controversies it was applicable. It was a right the title to which is founded upon usage, and its measure is therefore to be sought in the usages which prevailed at the time when it was asserted. But never in England was there any usage, and consequently never was there any right in the subject, that every litigated question of fact should be submitted to a jury. In all that large class of cases which are cognizable in courts of equity, there never was any right of trial by jury; nor did the right extend to many other civil and criminal proceedings. Summary convictions for petty offenses against statutes were always sustained, and they were never supposed to be in conflict with the common-law right to a trial by jury.

The ancient as well as the modern British statutes at large are full of acts of Parliament authorizing such convictions. Without referring to those which have been passed against nonattendance upon public worship of the Established Church, against refusal to take oaths of allegiance, against profaneness and embezzlement, all of which provided for conviction and punishment of offenders without the intervention of a jury, it may suffice to notice the vagrant acts, and the proceedings under them. References to the oldest of them will be found in the fourth volume of Burn's Justice, 19th edition, under the title "Vagrants." The more modern, the statute of 5 Geo. IV, c. 83, is contained in the British Statutes at Large, and also in 2 Chitty's Statutes, 145, under the head of "Criminal Law, Vagrancy." By the statute of 7 James I, c. 4, it was enacted that idle and disorderly persons shall be sent to the house of correction; and provision was made for a summary conviction. That act has repeatedly been substantially reenacted and enlarged. What constitutes idleness and disorder, what amounts to vagrancy, has been defined in England, as it has been in this, and most, if not all, of our sister states; and uniformly under these acts summary convictions have been authorized. Perhaps all vagrants are within the class denominated idle and disorderly persons by the statute of 7 James I, c. 4.

There are also in England very old acts of Parliament providing for the arrest, summary conviction, and punishment of rogues and vagabonds. These are, however, only vagrant acts, the vagrancy being of a more aggravated character. Who should be deemed rogues and vagabonds was declared by the statutes of 17 Geo. II, c. 5, 23 Geo. III, c. 88, and 5 Geo. IV, c. 83. Among the classes defined by the first of these acts were persons who gathered alms under the pretense of losses, fortune tellers, gamblers, and all who wander abroad begging; and under the two later acts, any persons apprehended having upon them any pick-lock, key, crow, etc., or other implement, with an intent feloniously to break and enter any dwelling house, etc., or having any offensive weapon with intent feloniously to assault any person, or who should be found in any dwelling house, warehouse, coach house, stable, or outhouse, or any inclosed yard or garden, etc., with intent to steal, or any suspected person or reputed thief frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf, or warehouse, near or adjoining thereto, or any street, avenue, or highway leading thereto, or any place of public resort, with intent to commit a felony.

This brief reference to English legislation is quite enough to show that the right of trial by jury was never without limits. Where, therefore, the right was spoken of in our Constitution, it was not meant an exemption from any summary conviction. Long before the settlement of this state, and down to the time when our first Constitution was adopted, vagrants, including rogues and vagabonds, were liable to such convictions, and to punishment under them. The right of trial by jury was never extensive enough to interfere with them. So it was understood by the framers of even our first Constitution. Before its adoption, we had a vagrant act which authorized summary convictions. One was passed in 1767; and in 1776, February 8, one was enacted respecting the city of Philadelphia, which authorized any justice of the peace of said city or county, on due examination and proof, to commit all rogues, vagabonds, and other idle, dissolute, and disorderly persons to the house of employment, there to be kept at hard labor for any term not exceeding three months. These acts were in force in 1776. In view of them, the first Constitution was made, and it declared, not that trials by jury should be in all cases, but as theretofore. And when that gave place to the later Constitutions, they undertook to preserve only that right which had been enjoyed.

We cannot, then, hold that the act of March 13, 1862, is in conflict with the constitutional right of trial by jury. Nor is it prohibited by that clause in the Declaration of Rights which declares that an accused person shall not be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land. The law of the land undoubtedly means due process of law; but a summary conviction of vagrancy, or an offense "eidem generis," is a conviction by due course of law. We do not mean to be understood as asserting that there may not be legislation conferring upon magistrates a power to convict summarily, which would be in violation of the Constitution. Undoubtedly there may. We speak only of the case before us. Vagrants, including rogues and vagabonds, and those who frequent public places for unlawful purposes, are liable to summary conviction and punishment, notwithstanding anything contained in the Constitution, for they were so liable before the Constitution was adopted. * * *

The conviction is affirmed, and the petitioners are remanded.[3]

LORD DACRES' CASE.

(Court of King's Bench, 1534. Kelyng, 56.)

The Lord Dacres' Case, who was indicted for Treason before Commissioners of Oyer and Terminer in the County of Cumberland, for adhering to the Scots, the King's Enemies, and tried by his Peers 26 Hen. VIII. Thomas, Duke of Norfolk, being High Steward; and the day before all the judges assembled to resolve certain Questions which might arise upon the said Tryal, so that if any Question should be asked them they might resolve una voce, and one Question was, whether the Prisoner might waive his Tryal by his Peers, and be tryed by the Country, and they all agreed he could not. For the Statute of Magna Charta is in the Negative, "Nec super eum ibimus nisi per legale judicium parium suorum," this is at the King's Suit upon an Indictment.

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[3] Accord: State v. Conlin, 27 Vt. 318 (1855); Ex parte Ah Peen, 51 Cal. 280 (1876); State v. Beneke, 9 Iowa, 203 (1859); Dougherty, In re, 27 Vt. 325 (1855).

STATE v. WOODLING.

(Supreme Court of Minnesota, 1893. 53 Minn. 142, 54 N. W. 1068.)

M. E. Woodling was arraigned before the municipal court of Minneapolis on a complaint for assault ~~and battery.~~ Defendant waived a jury, ~~and was found~~ guilty by the court, and ordered to pay ~~a fine~~. Defendant appeals.

Mitchell, J.[4] The defendant, having been arraigned before the municipal court of Minneapolis upon a complaint for assault and battery, pleaded not guilty, and expressly waived a jury, and thereupon the court, having tried the case, found the defendant guilty, and ordered that he pay a fine of $25. The defendant on appeal raises two points: First, that the judgment was not justified by the evidence; and, second, that the court had no jurisdiction to render judgment without the verdict of a jury. * * *

2. As to what constitutional rights may be waived by defendants in criminal cases, and particularly whether they can waive the right of trial by jury, is a subject upon which much has been written, and upon which there is much difference of opinion. Without going into any general discussion of the subject, we may say that it seems to us that perhaps the true criterion is whether the right is a privilege intended merely for the benefit of the defendant, or whether it is one which also affects the public, or goes to the jurisdiction of the court. If it belongs to the first class, we see no good reason why the accused may not waive it; but, if it belongs to the latter, it would seem that no consent on his part could amount to a valid waiver; and the different views entertained as to the nature and object of constitutional provisions relating to the right of trial by jury in criminal cases will probably account for the conflict of decisions as to whether it can be waived.

Those who construe the right as a matter in which the public has no interest, and which is not jurisdictional, but designed solely for the protection of the defendant, naturally hold that it may be waived;[5] while those who take the view that it affects the public as well as the defendant, or that it relates to the constitution of the court, of which it is intended to make the jury an essential part, as naturally hold that it cannot be waived. If our Constitution provided, as did the original Constitution of the United States (article 3, § 2), that "the trial of all crimes (except in cases of impeachment) shall be by jury," there would be good grounds for arguing that a jury was intended to be an essential part of a constitutional tribunal for the trial of crimes, without which it would not be legally constituted, any more than it would be without a judge. But our Constitution contains no such provision. Its language is (article 1, § 6): "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," etc.

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[4] Part of this case is omitted.

[5] See Cancemi v. People, 18 N. Y. 128 (1858); Paulsen v. People, 195 Ill. 507, 63 N. E. 144 (1902); Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007 (1904); State v. Lockwood, 43 Wis. 403 (1877); State v. Maine, 27 Conn. 281 (1858); State v. Jackson, 106 La. 189, 30 South. 309 (1901); State v. Holt, 90 N. C. 749, 47 Am. Rep. 544 (1884).

This language imports merely a grant or guaranty of a right to the accused for his own protection, and seems to us never to have been intended to prescribe the organization of the court, or to make a jury an essential part of it. If this be so, it necessarily follows that the presence or absence of a jury is not a jurisdictional matter—that is, it does not go to the constitutional organization of the court—and that, if the defendant cannot waive a jury trial, it must be purely upon grounds of public policy, and because the public have such an interest in the life and liberty of the citizen that he ought not to be allowed to waive this safeguard which the Constitution has thrown around him. If the right is intended merely for his protection, it is difficult to see why on principle he may not waive it, or why any distinction in that regard should be made between the right to a jury trial and various other rights which it is uniformly held that he can waive.

It is also difficult to perceive the distinction sometimes made in this respect between misdemeanors and felonies, unless it be founded on considerations of public policy growing out of the greater severity of punishment in case of the latter.[6] The logic of both the decision and the reasoning in State v. Sackett, 39 Minn. 69, 38 N. W. 773, would tend strongly to the conclusion that the accused, irrespective of any statute authorizing it, might waive a jury in any criminal case; for a "jury," within the meaning of the Constitution, imports a body of 12 men. State v. Everett, 14 Minn. 439, (Gil. 330.) But we are not at present prepared, neither is it necessary in this case, to go that far.

As already suggested, if the accused cannot waive a jury, his inability to do so must rest wholly upon some supposed consideration of public policy. The Constitution contains no provision forbidding him to do so, or prohibiting the Legislature from permitting it to be done. On many matters, what is and what is not in accordance with public policy is largely within the discretion of the Legislature. In fact, public policy is largely the creation of the Legislature. In the absence of any constitutional prohibition, we fail to see why a declaration of legislative views as to the policy of permitting the accused to waive a jury trial is not decisive of the matter. Now, from the earliest territorial days, long antedating the adoption of the Constitution, we had, and still have, a statute authorizing, or at least recognizing, the right of defendants accused of any offense cognizable by justices of the peace to waive a jury, and submit to trial by the court. St. 1851, c. 69, art. 4, § 172; St. 1878, c. 65, § 146. So far as we are aware, these statutes have been uniformly acted upon, and their validity never called in question.

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[6] This distinction is taken in some cases. See Brewster v. People, 183 Ill. 143, 55 N. E. 640 (1899); State v. Alderton, 50 W. Va. 101, 40 S. E. 350 (1901).

This conclusively shows that, in the view of the Legislature, it is expedient and in accordance with public policy to permit a jury to be waived in the case of all those petty offenses which are triable by justices; and this is the view taken in most, if not all, other jurisdictions. When the Legislature created the municipal court of Minneapolis, it provided that "it should have exclusive jurisdiction to hear all complaints, and conduct all examinations and trials, in criminal cases arising or triable within the city of Minneapolis heretofore cognizable before a justice of the peace." Sp. Laws 1889, c. 34, § 2. In other words, the municipal court took the place of justices of the peace, its criminal jurisdiction being the same, and not greater. The act creating the court does not in terms provide for the waiver of a jury trial by the defendant, as in justice's court, but it seems to us that this is necessarily implied. There is no reason why, if it was policy to permit defendants to do so in justice's court, it was not equally so to permit it in the same class of cases before the municipal court.

It is urged that the fact that a defendant has a right of appeal from a justice to the district court where he may have a trial de novo before a jury, while no such right of appeal is given from the municipal court, (the appeal from the latter being directly to the supreme court,) renders the statute relating to the waiver of a jury in justice's court inapplicable to the municipal court. If the statute assumed to deny the defendant the right to a jury in justice's court, there would be some force in this suggestion. But it does nothing of the kind; it merely authorizes him to waive the right if he sees fit to do so. We cannot see how the difference in the right of appeal (which is a purely statutory right) has any bearing on the question. Our conclusion therefore is that a defendant may waive a jury in the municipal court the same as in justice's court. See In re Staff, 63 Wis. 285, 23 N. W. 587, 53 Am. Rep. 285, in which it is evident that the court, but for its regard for the rule of stare decisis, would have gone still further, and held that no legislative sanction whatever was necessary to permit the defendant to waive a jury trial in such cases. Judgment affirmed.[7]

VANDERBURGH, J., absent, took no part.

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[7] Accord: Under statutes. In re Staff, 63 Wis. 285, 23 N. W. 587, 53 Am. Rep. 285 (1885); State v. Worden, 46 Conn. 349, 33 Am. Rep. 27 (1878); Dillingham v. State, 5 Ohio St. 280 (1855); Ward v. People, 30 Mich. 116 (1874); Hallinger v. Davis, 146 U. S. 314, 13 Sup. Ct. 105, 36 L. Ed. 986 (1892).

Accord: In absence of statute. State v. Kaufman, 51 Iowa, 578, 2 N. W. 275, 33 Am. Rep. 148 (1879).

Where the statute authorizing a waiver of jury trial provides that the offense may be tried by the court unless a jury is demanded, the mere neglect of defendant to demand a jury has been held to be a waiver. McClellan v. State, 118 Ala. 122, 23 South. 732 (1897); Clinton v. Leake, 71 S. C. 22, 50 S. E. 541 (1905). Where the statute provides that the case may, "by agreement of the parties, be tried by a jury of less than twelve jurors," it was held that mere failure to object to trial by a jury of less than twelve was not a

SECTION 2.—QUALIFICATIONS OF JURORS

"Quod faciat 12 liberos et legales homines de vicineto," &c. Albeit the words of the writ be duodecim, yet by ancient course the sherife must return 24; and this is for expedition of justice: for if 12 should onely be returned, no man should have a full jury appear, or be sworn in respect of challenges, without a tales, which should be a great delay of tryalls. So as in this case usage and ancient course maketh law. And it seemeth to me, that the law in this case delighteth herselfe in the number of 12; for there must not onely be 12 jurors for the tryall of matters of fact, but 12 judges of ancient time for tryall of matters of law in the Exchequer Chamber. Also for matters of state there were in ancient time twelve Counsellors of State. He that wageth his law must have eleven others with him, which thinke he says true. And that number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, &c.

He that is of a jury, must be liber homo, that is, not only a freeman and not bond, but also one that hath such freedome of mind as he stands indifferent as he stands unsworne. Secondly, he must bee legalis. And by the law every juror, that is returned for the tryall of any issue or cause, ought to have three properties.

First, he ought to be dwelling most neere to the place where the question is moved.[8]

Secondly, he ought to be most sufficient both for understanding, and competencie of estate.

Thirdly, he ought to be least suspitious, that is, to be indifferent as he stands unsworne: and then he is accounted in law liber et legalis homo; otherwise he may be challenged, and not suffered to be sworne.

Coke on Littleton, bk. 2, c. 12, § 234, 155, a.

When the defendants have put themselves upon the country, and the jurors are come into court, they may be challenged in the following form: Sir, this man ought not to be upon the jury, because he indicted me, and I presume of him and all those who indicted me, that they still bear the same ill will against me as when they indicted me.

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waiver. Warwick v. State, 47 Ark. 568, 2 S. W. 335 (1886). But see, State v. Wiley, 82 Mo. App. 61 (1899).

Waiver by defendant's attorney without the consent of defendant does not bind him. U. S. v. Shaw (D. C.) 59 Fed. 110 (1893).

[8] "Though the ancient law continues in force as to trials for crimes, yet it hath been long deviated from in practice. * * * The sheriffs, as we are well informed, now always summoning juries from the county at large, without the least regard to the visne of each indictment." Butler and Hargraves' Coke on Littleton, 125, a, note 191.

And we will that, where a man's life is at stake, this exception shall be allowed. They may also be challenged in many other ways besides this, as shall be shown in treating of exceptions. And when the accused either cannot or will not challenge the jurors, or there are jurors enough unchallenged, to the number of twelve, let them go to the book. If there are not sufficient, let the challenges be tried; and if the challenges be found true, so that there are not full twelve remaining, let another day be appointed, and let the sheriff summon more.

Britton, bk. 1, 12.

The term "challenge" is used in law for an exception to jurors who are returned to pass on a trial, and it is either to the array or to the polls. To the array is when exception is taken to the whole number impanneled; and to the polls is when some one or more are excepted against as not indifferent. Challenge to jurors is also divided into challenge principal or peremptory, and challenge per cause; i. e., upon cause or reason.

The challenges to the array, or the polls, may be made either by the crown or the defendant. On the part of the former, it seems that at common law any number of jurors might have been peremptorily challenged, without alleging any other reason for the objection than "quod non boni sunt pro rege."

Challenges on behalf of the defendant are either peremptory or with cause. Peremptory challenges are those which are made to the juror without assigning any reason and which the courts are compelled to allow. The number which, in all cases of felony, the prisoner was allowed by the common law thus peremptorily to challenge, amount to thirty-five, or one under the number of three full juries. This number has, however, been altered by several legislative provisions. So that, at the present day, in cases of high and petit treason, the prisoner has thirty-five peremptory challenges; in murders and all other felonies, twenty; and in misprision of treason, the point seems to be unsettled.

The right of peremptorily challenging is admitted only in favor of life; and, though it may be demanded even in clergyable felonies, it can never be allowed to a defendant accused of a mere misdemeanor.

Challenges for cause are of two kinds—first, to the whole array; second, to individual jurymen. To challenge the array is to except at once to all the jurors in the panel on account of some original defect in making the return to the venire. It is either a principal challenge or for favor, the former of which is founded on some manifest partiality, and is therefore decisive, while the grounds of the latter are less certain, and left to the determination of triers, in the manner we shall state hereafter. The legitimate causes of a principal challenge are not very numerous. Thus, if the sheriff be the actual prosecutor or the party aggrieved, the array may be challenged, though no objection can be taken in arrest of judgment. So if the sheriff be of actual affinity to either of the parties, and the relationship be existing at the time of the return; if he return any individual at the request of the prosecutor or the defendant, or any person whom he believes to be more favorable to one side than to the other; if an action of battery be depending between the sheriff and the defendant, or if the latter have an action of debt against the former—the array may be quashed on the presumption of partiality in the officer. So, also, if the sheriff, or his bailiff who makes the return, is under the distress of the party indicting or indicted, or has any pecuniary interest in the event, or is counsel, attorney, servant, or arbitrator in the same cause, a principal challenge will be admitted. And, in general, the same reasons which we have already seen would cause it to be directed to the coroners or elisors will also be sufficient to quash the array, when partiality may reasonably be suspected. For all these causes of suspicion, the king may challenge as well as the defendant.

Causes of challenge for favor are when one of the parties is tenant to the sheriff, if the sheriff has an action of debt against him, or where a relationship does not subsist between the party and the officer immediately, but between their children; for, as these circumstances do not necessarily imply partiality, they are no ground of a principal challenge.

If the challenge to the array be determined against the party by whom it was made, he may afterward have his challenge to the polls; that is, he may separately object to each juryman as he is about to be sworn. And challenges to the polls, like those to the array, are either principal or to the favor; and after challenging thirty-five jurors in treason, and twenty in felony, peremptorily, the defendant may, for cause shown, challenge as many jurors as may be called, so as to exhaust one or more panels, if his causes of objection be well founded.[9] The most important causes of the first of these descriptions of challenges are propter honoris, propter defectum, propter affectum, and propter delictum, which we shall now proceed to consider.

A challenge propter defectum may be either on account of some personal objection, as alienage, infancy, old age, or a deficiency in the requisite property.

The third description of challenges are those which arise propter affectum, or on the ground of some presumed or actual partiality in the juryman who is made the subject of objection. For the writ, requiring that the jury should be free from all exception and of no affinity to either party, must evidently include both these grounds of challenge. If, therefore, the juror is related to either party within the ninth degree, though it is only by marriage, a principal challenge will be admitted.[10] So also if he has acted as godfather to a child of the prosecutor or defendant, he may be challenged for that reason. And it will be no answer to such a challenge that he is also related to the other party, because by the terms of the writ he ought to be akin to neither. Thus also if the juryman be under the power of either party or in his employment, or if he is to receive part of a fine upon conviction, or if he has been chosen arbitrator in case of a personal injury for one of the parties, or has eaten and drank at his expense, he may be challenged by the other. So if there are actions depending between the juryman and one of the parties, which imply hostility, that will be a ground of principal challenge, though other actions only warrant challenges to the favor. And, in general, the causes of this nature which would justify a challenge to the array, on the ground of the presumed partiality of the sheriff, will be sufficient exceptions to an individual juror.

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[9] The number of peremptory challenges allowed is now generally fixed by statute, and varies in different states. See, People v. Keating, 61 Hun, 260, 16 N. Y. Supp. 748 (1891); State v. Anderson, 59 S. C. 229, 37 S. E. 820 (1901); State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89 (1880).

An actual partiality may also be shown, as well as a supposed bias. Thus if a juryman has expressed his wishes as to the result of the trial, or his opinion of the guilt or innocence of the defendant, with a malicious intention, on evidence of those facts, he will be set aside. And if either party has exhorted him as to the nature of his verdict, he may be challenged, but not if the entreaty merely were to attend and act according to his conscience. If it be proved that the juror has, in contempt, called his dogs by the names of the king's witnesses, that will be a sufficient ground of challenge on behalf of his majesty.

By the statute 25 Edw. III, c. 3, a man who has acted as a grand juryman on the finding of a bill of indictment may be objected to if returned to serve on the petit jury.

The last ground for a principal challenge to the polls is propter delictum, or the legal incompetence of the juror on the ground of infamy. Thus if he has been convicted or attainted of treason, felony, perjury, conspiracy, or any crime for which he ought to lose life or member, or if for some infamous offense, he has received judgment of the pillory, tumbrel, or other shameful exposure, or to be whipped, branded, or stigmatized; or if he has been attainted of false verdict, præmunire or forgery; or outlawed or excommunicated, or if he has proved recreant when champion in the trial by battle—he may be challenged and the exception must prevail. And, in these cases, even the king's pardon will not remedy the defect which the operation of justice has created.

Challenge to the polls for favor, are when, though the juror is not so evidently partial as to amount to a principal challenge, yet there are reasonable grounds to suspect that he will act under some undue influence or prejudice. The causes of such a challenge are manifestly numerous and dependent on a variety of circumstances; for the question to be tried is whether the juryman is altogether indifferent as he stands unsworn, because he may be even unconsciously to himself swayed to one side, and indulge his own feelings when he thinks he is influenced entirely by the weight of evidence. And, in general, the same circumstances will operate as a ground of objection to the favor of a single juryman, as we have seen may be urged on a challenge to the array, for the partiality of the returning officer.

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[10] "The great-grandmother of the juror Ray was the sister of the grandmother of the prisoner. * * * In this case, the juror Ray was within the prescribed degree related to the prisoner. From the grandmother were three degrees, and from the great-grandmother four, making in the whole seven degrees, which was a cause of principal challenge on the part of the state, and the juror was properly rejected." Nash, C. J., in State v. Perry, 44 N. C. 330 (1853).

1 Chitty, Cr. Law, 533–545.

UNITED STATES v. BURR.

(Circuit Court of the United States, 1807. Robertson's Trial of Aaron Burr, 464, 25 Fed. Cas. 50.)

MARSHALL, Chief Justice.[11] The great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution prize it because it furnishes a tribunal which may be expected to be uninfluenced by any undue bias of the mind.

I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the Constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it. This is not to be expected, certainly the law does not expect it, where the jurors, before they hear the testimony, have deliberately formed and delivered an opinion that the person whom they are to try is guilty or innocent of the charge alleged against him.

The jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those preconceived opinions which will resist those impressions.

All the provisions of the law are calculated to obtain this end. Why is it that the most distant relative of a party cannot serve upon his jury? Certainly the single circumstance of relationship, taken in itself, unconnected with its consequences, would furnish no objection. The real reason of the rule is that the law suspects the relative of partiality; suspects his mind to be under a bias which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him. The end to be obtained is an impartial jury. To secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality. The relationship may be remote, the person may never have seen the party, he may declare that he feels no prejudice in the case, and yet the law cautiously incapacitates him from serving on the jury, because it suspects prejudice; because in general persons in a similar situation would feel prejudice.

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[11] Part of this opinion is omitted.

It would be strange if the law were chargeable with the inconsistency of thus carefully protecting the end from being defeated by particular means, and leaving it to be defeated by other means. It would be strange if the law would be so solicitous to secure a fair trial as to exclude a distant unknown relative from the jury, and yet be totally regardless of those in whose minds feelings existed much more unfavorable to an impartial decision of the case.

It is admitted that, where there are strong personal prejudices, the person entertaining them is incapacitated as a juror; but it is denied that fixed opinions respecting his guilt constitutes a similar incapacity.

Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence and be governed by it; but the law will not trust him.

Is there less reason to suspect him who has prejudged the case, and has deliberately formed and delivered an opinion upon it? Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms than to that which would change his opinion. It is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.

It is for this reason that a juror who has once rendered a verdict in a case, or who has been sworn on a jury which has been divided, cannot again be sworn in the same case. He is not suspected of personal prejudices, but he has formed and delivered an opinion, and is therefore deemed unfit to be a juror in the cause.

Were it possible to obtain a jury without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required. The opinion which has been avowed by the court is that light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him. Those who try the impartiality of a juror ought to test him by this rule. They ought to hear the statement made by himself or given by others, and conscientiously determine, according to their best judgment, whether in general men under such circumstances ought to be considered as capable of hearing fairly, and of deciding impartially, on the testimony which may be offered to them, or as possessing minds in a situation to struggle against the conviction which that testimony might be calculated to produce. The court has considered those who have deliberately formed and delivered an opinion on the guilt of the prisoner as not being in a state of mind fairly to weigh the testimony, and therefore as being disqualified to serve as jurors in the case.

This much has been said relative to the opinion delivered yesterday, because the argument of to-day appears to arraign that opinion, and because it seems closely connected with the point which is now to be decided.

The question now to be decided is whether an opinion formed and delivered, not upon the full case, but upon an essential part of it, not that the prisoner is absolutely guilty of the whole crime charged in the indictment, but that he is guilty in some of those great points which constitute it, do also disqualify a man in the sense of the law and of the Constitution from being an impartial juror? This question was adjourned yesterday for argument, and for further consideration.

It would seem to the court that to say that any man who had formed an opinion on any fact conducive to the final decision of the case would therefore be considered as disqualified from serving on the jury would exclude intelligent and observing men, whose minds were really in a situation to decide upon the whole case according to the testimony, and would perhaps be applying the letter of the rule requiring an impartial jury with a strictness which is not necessary for the preservation of the rule itself. But if the opinion formed be on a point so essential as to go far towards a decision of the whole case, and to have a real influence on the verdict to be rendered, the distinction between a person who has formed such an opinion, and one who has in his mind decided the whole case, appears too slight to furnish the court with solid ground for distinguishing between them. The question must always depend on the strength and nature of the opinion which has been formed.

In the case now under consideration the court would perhaps not consider it as a sufficient objection to a juror that he did believe and had said that the prisoner, at a time considerably anterior to the fact charged in the indictment, entertained treasonable designs against the United States. He may have formed this opinion, and be undecided on the question whether those designs were abandoned or prosecuted up to the time when the indictment charges the overt act to have been committed. On this point his mind may be open to the testimony, although it would be desirable that no juror should have formed and delivered such an opinion, yet the court is inclined to think it would not constitute sufficient cause of challenge. But, if the juror have made up and declared the opinion that to the time when the fact laid in the indictment is said to have been committed the prisoner was prosecuting the treasonable design with which he is charged, the court considers the opinion as furnishing just cause of challenge, and cannot view the juror who has formed and delivered it as impartial, in the legal and constitutional sense of that term. * * *

LESTER v. STATE.

(Court of Appeals of Texas. 1877. 2 Tex. App. 432.)

WHITE, J.[12] * * * With regard to the jury which tried the case, we find two questions presented in the motion for a new trial and bill of exceptions, and which are also assigned as error. The first is that, in testing the qualifications of the jurors, the court permitted the county attorney, over the objections of the defendant, to ask the jury "if they could return the same kind of a verdict against a white man for killing a negro that they would against a white man for killing another white man, upon the same evidence." * * *

It is gravely urged in the brief of counsel, from which we quote, that "appellant is a white man and a Democrat; the deceased was a negro, and, of course, a Republican. On account of the test to the jury, no juror was permitted to try the case until he had, in effect, taken an oath that he regarded a negro as highly as he did a white man. By this means jurors of the political belief of appellant were excluded, although thoroughly and legally competent to try the case, and appellant was tried by his political enemies, with the question of race fairly raised and at issue."

We cannot express too forcibly our condemnation of such arguments and appeals to political passions and prejudices. The very fact that they are made proves the necessity of guarding against them in the execution of the law. The law, we think, has properly made it a crime equal in magnitude to kill a negro as to kill a white man, and denounces its punishment for such crime equally alike, without reference to race, color, previous condition, or political considerations. If there be, as the argument indicates, in the country, men who feel and believe, morally, socially, politically, or religiously, that it is not murder for a white man to take the life of a negro with malice aforethought, then we unhesitatingly say such men are not fit jurors, in contemplation of law, to try a white man for such a crime. Men holding such opinions cannot be said to be without bias or prejudice in favor of a white man who is the defendant; and bias or prejudice is, as we have seen, one of the grounds of challenge for cause set forth in the statute.

The court did not, therefore, err in permitting the question to be asked, in order to elicit with certainty this fact in regard to the bias or prejudice of the jurors; and the statute declares that "the court is the judge, after proper examination, of the qualifications of a juror." Pasch. Dig. art. 3044. * * *

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[12] Part of this case is omitted.

Judgment reversed.[13]

CAVITT v. STATE.

(Court of Appeals of Texas, 1883. 15 Tex. App. 190.)

Willson, J.[14] * * * It appears from a bill of exception in the record that, in testing the qualifications of jurors, the defendant proposed to propound to each person offered as a juror the following question, viz.: "Have you the same neighborly regard for this defendant, though a negro, and his race generally, as you have for individuals of the white race?" Objection being made to this question by the district attorney, the court would not allow it to be propounded, but each juror was asked the statutory questions, and, in addition thereto, the defendant was permitted to ask each juror "if he could and would give to the defendant the same fair and impartial trial under the law and the evidence that he would give to a white man under the same circumstances, and would try the case without regard to the question of color." It is true that proper questions to test the bias in favor of, or the prejudice against a defendant, should be allowed in examining as to the fitness of a person offered as a juror to serve as such. But a question, to be proper, should be directed to the issue as to whether or not the person proposed as a juror is impartial, and in a condition of mind and feeling to try the case fairly.

We cannot perceive that the question proposed by the defendant would be a proper one. If answered by the person to whom propounded in the negative, it certainly would not disqualify him as a juror, nor would it show that he was prejudiced against the defendant, or the defendant's race, nor that such person would be likely to be influenced in his verdict because he did not have the same "neighborly regard" for a negro that he had for a white man. If this were held to be sufficient cause to disqualify a person from serving as a juror, then all juries would have to be selected with reference to the race, nationality or class to which the defendant belonged; for, as a general rule, no white man has the same neighborly or social regard for a negro that he has for a white man, and the case is the same with the negro. So with the Mexican, the Irishman, the German; they have a greater neighborly regard for their own countrymen than for an American, and the American has a stronger neighborly regard for one of his own country than for a foreigner. This same objection as to neighborly regard would apply to classes as well as to races or nationalities; to farmers, merchants, mechanics, doctors, lawyers, etc. An individual generally has a stronger neighborly regard for one of his own class than for one of a different class. We think the court was correct in refusing to permit the proposed question to be propounded. Lester v. State, 2 Tex. App. 432.

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[13] The judgment was reversed on other grounds.

[14] Part of this case is omitted.

But, even if the question was improperly rejected, the rejection of it was a matter within the discretion of the trial judge, the exercise of which discretion would not be revised by this court, unless it was made clearly to appear to us that the same had been abused to the prejudice of the accused; and in this case it does not so appear. Ray v. State, 4 Tex. App. 450; Gardenhire v. State, 6 Tex. App. 147.

* * *

Affirmed.

HELM v. STATE.

(Supreme Court of Mississippi, 1890. 67 Miss. 562, 7 South. 487.)

Woods, C. J.[15] * * * The assignment of error which raises the disqualification of the juror Johnson because of his prejudice is not well taken. There is nothing in all the evidence on this proposition which is even persuasive to show that Johnson was not altogether competent to serve as a juror. The juror is not shown to have ever heard what the evidence, or any part of it, was, before he heard it in the jury box; and it seems impossible that he could have either formed or expressed an opinion as to defendant's guilt, in the absence of proof of any knowledge of the evidence. He is shown, fairly well, to have had not a favorable opinion of the character of the accused, and perhaps no better opinion of that of the deceased; but, if a good opinion of the character of every accused person shall be held requisite for qualification for jury service, then the worst class of criminals must, ordinarily, go unwhipped of public justice. There was no hostility or unfriendliness to the man. There was, at the most, disapprobation of his unlovely character. But this did not and should not be held disqualification as a juror. Nor was there such evidence of a preconceived opinion as will warrant us in saying the court below was not justified in refusing to believe that the juror, in this instance, was so biased as to unfit him for jury service. * * *

The judgment of the court below was abundantly warranted by the evidence, and is approved by us. Affirmed.

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[15] The statement of facts, the arguments of counsel and part of the opinion are omitted.

SWIGART v. STATE.

(Supreme Court of Indiana, 1879. 67 Ind. 287.)

Biddle, J. The appellant was indicted, under section 17 of the liquor law of March 17, 1875 (1 Rev. St. 1876, p. 869), for keeping a licensed saloon in a disorderly manner. Trial by a jury, conviction and fine. He appeals.

A motion to quash the indictment, and a motion in arrest of judgment, were overruled, and exceptions reserved. No error was committed in these rulings. The indictment is clearly sufficient.

At the trial, Isaac Chamness was called as a juror, and, upon his voire dire, was submitted to the following examination:

"Question. Do you think a man who is engaged in selling intoxicating liquor under a license is engaged in a legitimate business?

"Answer. Never thought it a legitimate business, although the law did grant it.

"Question. Do you think a man engaged in the sale of liquor under a license is a moral man?

"Answer. I think not; I think him immoral."

To a further question the juror answered "that he had not such prejudice as would influence him in determining the cause; that he could give the defendant a fair and impartial trial, according to the law and the evidence."

Upon this examination the defendant challenged the juror for cause. The challenge was overruled, and the juror impaneled. Exceptions reserved.

Was the juror competent to serve in the case?

We think he was not. He might have been put in a position by the evidence in the case which would require him to either break the law or violate his moral sense, and thus necessarily be gored by one horn or the other of the dilemma. Law is uniform, and binds all. The moral sense is as variable as the difference between human beings, and binds no one but the individual. Each person will be protected in his moral sense, but one man's moral sense cannot be forced upon another. The law is to be administered on legal grounds only, and what the law authorizes it will not hold immoral. Conscientious scruples in inflicting the death penalty will render a juror incompetent to try a charge of murder in a case where the punishment may be death; much stronger are the reasons to disqualify a juror when he is called upon to adjudge a law, and decide upon the facts of a pursuit which it authorizes and upholds, both of which he regards as immoral. The appellant was entitled to a juror who could, without violating his moral sense, either convict him or acquit him of the charge, according to the law as it is, and the facts as they were proved in the case. Keiser v. Lines, 57 Ind. 431.

The judgment is reversed, and the cause remanded, with instructions to sustain the motion for a new trial, and to proceed according to this opinion.[16]

SECTION 3.—TIME OF TRIAL

It hath also been thought unmeet that they should trie a felon the same day in which they awarded the venire facias against the jurie, 22 Edw. IV, 44, Fitz. tit. Coron. 44, but that hath no necessitie, and the law is now otherwise taken.

Lambard's Eirenarcha, 551.

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[16] "One of the jurors, after having been asked this question, and also whether he had any such opinions as would preclude him from finding a defendant guilty of an offense punishable with death, in reply to the latter inquiry, said that he was opposed to capital punishment, but that he did not think that his opinions would interfere with his doing his duty as a juror; that as a legislator he should be in favor of altering the law, but he believed that he could execute it as a juror, as it was. The court intimated to the juror that he must decide for himself whether the state of his opinion was such as would prevent his giving an unbiased verdict; that, as he had stated it, the court did not consider him disqualified; and he was accordingly sworn. When this juror was called to take his seat upon the panel, after all the other jurors had been sworn, he stated to the court that he thought it inconsistent for him to serve as a juror, holding the opinions he did, and should prefer being left off; that he thought he could give an unbiased verdict, yet he had a sympathy for the prisoner and his family, and feared that his opinions in relation to capital punishment might influence others of the jury. The court ruled that his case did not come within the statute, and declined to excuse him." Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711 (1850).

See, also, People v. Stewart, 7 Cal. 140 (1857); Atkins v. People, 16 Ark. 568 (1855).

"Another juror, being questioned, said he did not know whether he had expressed an opinion or not; that from what he had read in the newspapers he had received an impression unfavorable to the prisoner, but that he had no fixed and definite opinion on the subject; he should be governed by the evidence. The prisoner objected to the juror for cause. The counsel for the government denied that there was cause. The court then asked the juror if, in his opinion, he had made up his mind so that he could not give the case an impartial hearing. The juror replied 'that he must say that his prejudices were against the prisoner.' The challenge for cause was thereupon allowed." Per curiam, in Commonwealth v. Knapp, 9 Pick. (Mass.) 499 (20 Am. Rep. 491) (1830).

A juror must have sufficient eyesight to distinguish the faces of witnesses. Rhodes v. State, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429 (1890). And sufficient hearing. Mitchell v. State, 36 Tex. Cr. R. 278, 33 S. W. 367, 36 S. W. 456 (1896). And mental capacity to understand the testimony and to remember it. Snowden v. State, 7 Baxt. (Tenn.) 482 (1874). Compare State v. Eloi, 34 La. Ann. 1195 (1882).

In general, a knowledge of the English language is necessary. State v. Push, 23 La. Ann. 14 (1871). But, where jurors so equipped are unobtainable, it has been held that persons ignorant thereof were competent; the testimony having been interpreted to them. In re Allison, 13 Colo. 525, 22 Pac. 820, 10 L. R. A. 790, 16 Am. St. Rep. 224 (1889).

BRUNSDEN'S CASE.

(Court of King's Bench, 1635. Cro. Car. 438, 448.[17])

Brunsden was indicted for extortion.

This case was now moved again by Keeling, Jr.; and he insisted upon for error, that neither justices of peace, nor justices of oyer and terminer might enquire, and take traverse, and determine indictments the same day; but justices in eyre and gaol delivery might, because there is warning given long before of their coming, and the offenders may know what matters are determinable there; and there is a precept for jurors to come out of all parts of the county to try and determine offences before committed, whereof the prisoners may take cognizance; and it is for the speedy delivery of the prisoners; and for this reason compared to the proceedings in this court, which is as the general eyre, as 27 Assise, 1. Where the proceedings are for offences committed in the county of Middlesex, this court is as eyre, to proceed de die in diem, and to award venire facias, returnable the next day, or at another day after, according to their appointment, without regard of fifteen days betwixt the teste and return; but if any indictments be removed out of London, or out of the sessions of the peace in Middlesex, by certiorari, or out of any other county, where the defendant is to plead here to the issue, the usual course is to award a venire facias, and to have fifteen days betwixt the teste and return; à multo fortiori in the sessions of the peace, or before justices of oyer and terminer. And for this point, vide 4 Hen. V, "Enquest," 5, by Hankford; 22 Edw. IV, "Coron." 44; 2 Hen. VIII, pl. 159, in Kelloway, Staunforde, 156.

All THE COURT was of this opinion, that justices of peace may not enquire, try, and determine civil offences in one and the same day; for the party ought to have a convenient time to provide for the trial. * * * [18]

REX v. HAAS.

(Supreme Court of Pennsylvania, 1764. 1 Dall. 9, 1 L. Ed. 14.)

Moved on the part of the defendant to oblige the Attorney General to bring on the trial, or discharge the defendant.

THE COURT said they would not force the crown to bring on the trial, nor discharge the defendant from bail, without some appearance of oppression.

If any person or persons shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term, or first day of the sessions of oyer and terminer or general gaol delivery, to be brought to his trial, shall not be indicted some time in the next term, sessions of oyer and terminer or general gaol delivery, after such commitment; it shall and may be lawful to and for the judges of the Court of King's Bench and justices of oyer and terminer or general gaol delivery, and they are hereby required, upon motion to them made in open court the last day of the term, sessions or gaol delivery, either by the prisoner or any one in his behalf, to set at liberty the prisoner upon bail, unless it appear to the judges and justices upon oath made, that the witnesses for the king could not be produced the same term, sessions or general gaol delivery; (2) and if any person or persons committed as aforesaid, upon his prayer or petition in open court the first week of the term or first day of the sessions of oyer and terminer and general gaol delivery, to be brought to his trial, shall not be indicted and tried the second term, sessions of oyer and terminer or general gaol delivery, after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment.

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[17] Sub nom. Bumsted's Case.

[18] Part of this case is omitted

St. 31 Car. II, c. 2, VII.

Ex parte STANLEY.

(Supreme Court of Nevada, 1868. 4 Nev. 113.)

Lewis, J.[19] The defendant is brought before this court upon a writ of habeas corpus, and his release claimed by counsel upon the grounds: First, that he cannot have a speedy trial in the county where he was indicted, and where it is claimed he has the right to be tried, because no competent jury can be obtained there, and no change of venue can be had upon the motion of the prosecution; and, second, that the order made by the court postponing the trial indefinitely, operated as a release of the prisoner, and consequently the sheriff has now no legal authority to hold him in custody.

That all persons held on a criminal charge have the legal right to demand a speedy and impartial trial by jury there can at this time be no doubt. The right was guaranteed to the English people by the Great Charter. It has been confirmed in subsequent bills of right, iterated and reiterated by the courts, and defended and protected by the representatives of the people with jealous care and resolute courage. In this country the same right is generally guaranteed by the Constitutions of the respective states, or secured by appropriate legislative enactments. That the defendant may claim this right there is no doubt. But what is to be understood by a speedy trial is the embarrassing question now to be determined. It is very clear that one arrested and accused of crime has not the right to demand a trial immediately upon the accusation or arrest being made. He must wait until a regular term of the court having jurisdiction of the offense with which he is charged, until an indictment is found and presented, and until the prosecution has had a reasonable time to prepare for the trial.

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[19] Part of this case is omitted.

Nor does a speedy trial mean a trial immediately upon the presentation of the indictment or the arrest upon it. It simply means that the trial shall take place as soon as possible after the indictment is found, without depriving the prosecution of a reasonable time for preparation. The law is the embodiment of reason and good sense; hence, whilst it secures to every person accused of crime the right to have such charge speedily determined by a competent jury, it does not exact impossibilities, extraordinary efforts, diligence or exertion from the courts, or the representatives of the state; nor does it contemplate that the right of a speedy trial which it guaranteed to the prisoner shall operate to deprive the state of a reasonable opportunity of fairly prosecuting criminals.

Section 582 of the criminal practice act indicates what is here understood by a speedy trial. That section declares that "if a defendant, indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial at the next term of the court at which the indictment is triable after the same is found, the court shall order the indictment to be dismissed, unless good cause to the contrary be shown."

The prisoner here certainly cannot complain that the court below has not endeavored, with the utmost diligence and good faith, to give him a trial, but having failed after repeated efforts to obtain a jury, and the judge having expressed an opinion that a jury could not be secured, the defendant considers himself entitled to be released. But it is not shown that every possible means of impaneling a jury has been exhausted, and that one could not possibly be obtained in the county. After having made all reasonable efforts to give the defendant a trial, and failing in it, I am inclined to believe that the court below had the right to continue the cause until the next term, if at such term a trial could probably be had. This effort to give the defendant a trial was at the first term after the court below had reacquired jurisdiction of the case by the disposition by this court of the appeal, which had previously been taken in it.

Section 318 of the criminal practice act, as amended in 1867 (Laws 1867, p. 127), confers upon the courts the right to continue the trial in a criminal case upon a proper showing by affidavit. In a case of this kind an affidavit would be entirely unnecessary, if the judge was satisfied that a jury could not be had at that term. I see no reason why, upon his own knowledge of the fact, he could not continue the case. If, upon affidavit of the prosecution, showing cause, the judge can continue a case for a term, why may he not do so upon his own knowledge of the fact that a trial cannot be had at that particular term?

There appears to be no reason why he may not do so. If it were clear that a jury could not be had at the next term, a continuance would be useless, and the prisoner should perhaps be discharged. But it does not follow that because there was a failure at one term of court to obtain a jury that one could not be secured at the next term.

It is very clear that there were many persons in the county qualified to act as jurors, whose attendance the court was not able to secure at the last term, who, however, may be summoned for the next term. Hence it is not by any means certain that a jury cannot be impaneled at the next term of the court. I do not hesitate to say that if at the next term the court fails, after proper efforts, to obtain a jury, that the defendant should be released. But it seems to me that he should not be discharged until every effort has been exhausted to bring him to trial. That the state cannot have the case transferred to another county for trial is evidently an omission in the law. It could not have been the intention to deprive it of that right, where a trial is rendered impossible in the proper county. A prisoner charged with a grave offense should, therefore, not be released upon the ground here taken, until all possible means of securing a jury are exhausted, and it is made perfectly certain that a trial cannot be had within a reasonable time in the proper county.

The order made by the court below, postponing the trial, was not regular. But it follows, from what has been said, that the case could have been continued for the term. Such was, perhaps, the effect of the order made. A continuance for the term would have been more regular, and the order had better be so modified.

The prisoner is remanded to the custody of the sheriff of Washoe county, to await the action of the district court.[20]

COMMONWEALTH v. JAILER OF ALLEGHENY COUNTY.

(Supreme Court of Pennsylvania, 1838. 7 Watts, 366.)

Habeas corpus for the body of William Phillips, committed for horse stealing. The prisoner was indicted at May sessions, 1838, but had obtained a continuance for the absence of witnesses. He had been brought up again for trial at the June sessions, but was found to be laboring under smallpox. Though convalescent, his aspect was so loathsome as to spread a general panic; and on the testimony of the physican of the prison that he might still communicate infection, he was remanded, though insisting on being tried. And now,

Mahon moved for his discharge under the third section of the habeas corpus act.

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[20] See, further, U. S. v. Fox, 3 Mont. 512 (1880); Ex parte Jefferson, 62 Miss. 223 (1884); Nixon v. State, 10 Miss. 497, 41 Am. Dec. 601 (1844).

Irwin, for the Commonwealth, insisted that the case was not distinguishable in principle from Commonwealth v. Sheriff and Jailer of Allegheny County, 16 Serg. & R. 304.

PER CURIAM. There is no doubt that necessity, either moral or physical, may raise an available exception to the letter of the habeas corpus act. A court is not bound to peril life in an attempt to perform what was not intended to be required of it. The Legislature intended to prevent willful and oppressive delay; and it is sufficient that there is no color for an imputation of it.

Prisoner remanded.

PEOPLE v. BUCKLEY.

(Supreme Court of California, 1897. 116 Cal. 146, 47 Pac. 1009.)

TEMPLE, J.[21] * * * The accused was not tried within 60 days after the filing of the information. He asked that the prosecution against him be dismissed for this reason. His motion was denied, and the ruling is relied upon here as error.

The Constitution and the laws alike guaranty a speedy trial, and section 1382 of the Penal Code prescribes that the prosecution shall be dismissed, unless good cause to the contrary be shown, if a defendant whose trial has not been postponed upon his application is not brought to trial within 60 days after the filing of the information. The motion was denied on three grounds: (1) The defendant himself applied for and obtained a postponement; (2) there was no opportunity to try defendant, as the court had been constantly occupied; and (3) a material witness for the prosecution was absent.

1. The case was postponed, on the application of defendant, from the 12th of February, 1895, to the 13th—one day. Does the postponement of one day, on the application of the defendant, deprive him entirely of the constitutional guaranty of speedy trial? Certainly not, and any such construction of the statute would be unreasonable.

2. In denying the motion, it was stated by the court that at no time since the plea had there been an opportunity to bring the case to trial except the 12th day of February, on which day the defendant asked for and obtained a continuance of one day, other cases having in the meantime occupied the attention of the court. Nothing is said about the nature of the other cases. They are not shown to have been cases of equal urgency, and then nothing is said of the other 11 departments of the same court. In my opinion, the constitutional guaranty imposes upon the state the duty of providing courts which, under ordinary conditions, can furnish a speedy trial. A speedy trial does not mean at once, but with all convenient dispatch, and implies courts in which a trial may be had. No doubt it also implies reasonable time for

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[21] Part of this case is omitted.

the state to provide courts and juries, and to procure witnesses. It imposes, however, a special duty upon the state with reference to such cases, and, if the duty is not performed, the prosecution should be dismissed. The Legislature has seen fit to lay down a rule by which the constitutional provision may be interpreted, which seems reasonable. In my opinon, the mere statement of the judge that the court has been otherwise engaged does not show good cause.

3. No diligence was shown to procure the attendance of the witness. Certainly, the statement of the witness that it would be a hardship to require him to come from Sacramento was a poor excuse for continuing the case 33 days, while the defendant was in jail, and liable to lose his witnesses by the delay. It was not shown that the services of the witness were at all important to the Legislature. The benefit of this constitutional guaranty cannot be denied on such flimsy showing.

Upon the showing made, I think the motion to dismiss the prosecution should have been granted, and the prosecution dismissed. Under the rule laid down in People v. Houston, 107 Cal. xvii, 40 Pac. 756, the information must be held good. The judgment and order are reversed.

Van Fleet and Henshaw, JJ., concur.

McFarland, J. I concur in the judgment of reversal, and in that part of the opinion of Mr. Justice Temple which holds that there is no evidence in the record sufficient to warrant the verdict. I do not concur in that part of said opinion which holds that in this case the prosecution should be dismissed because the defendant was not tried within 60 days after the filing of the information.

Harrison, J. I concur in the judgment of reversal upon the ground, as set forth by Mr. Justice Temple in his opinion, that the evidence, as shown by the record, was insufficient to justify the verdict. I am of the opinion, however, that the court did not err in refusing to dismiss the cause. The information was filed December 27, 1894, and the defendant was arraigned January 4th, and, having taken time to plead, on the 11th of January demurred to the information. Argument was had upon this demurrer January 18th, and on the 25th of January the court overruled the demurrer, and the defendant entered a plea of not guilty. This was the first point of time after the filing of the information at which the defendant could be brought to trial, and his trial was had on the 18th of March. Whatever time was consumed by him in dilatory motions or pleas which had the effect to postpone the time at which he could be brought to trial was "good cause to the contrary," upon his application, for the dismissal of the cause, under section 1382 of the Penal Code.[22]

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[22] Garoutte, J., concurred in the judgment.

See, also, State v. Radoicich, 66 Minn. 294, 69 N. W. 25 (1896); Ex parte Caples, 58 Miss. 358 (1880); State v. Brodie, 7 Wash. 442, 35 Pac. 137 (1893).

Under the statutes of some states the defendant is entitled, if he is not tried within a prescribed time, to be discharged and acquitted of the offense

SECTION 4.—PRESENCE OF DEFENDANT, JUDGE, COUNSEL AND WITNESSES

When any felons appear in judgment to answer of their felony, our will is that they come barefooted, ungirt, uncoifed, and bareheaded, in their coat only, without irons or any kind of bonds, so that they may not be deprived of reason by pain, nor be constrained to answer by force, but of their own free will; and then, agreeably to the presentment against them, let them be indicted.

Britton (Nichols-Baldwin) 29.

I take it to be a settled rule at common law, that no counsel shall be allowed a prisoner, whether he be a peer or commoner, upon the general issue, on an indictment of treason or felony, unless some point of law arise proper to be debated.

Hawk. P. C. (Curw. Ed.) 554.

VAUGHAN'S CASE.

(Court of King's Bench, 1696. Holt, 689.)

The Prisoner being brought to his Trial, and complaining of his Irons, the Chief Justice order'd them to be knock'd off, that he might stand at ease whilst he made his Defence; after which he pleaded Not guilty. * * *

The Prisoner then desiring, that the Witnesses might be examined apart, out of the hearing of each other, the Court granted his Request as a Favour, but told him he could not demand it as his Right.[23] * * *

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charged. See Durham v. State, 9 Ga. 306 (1851); McGuire v. Wallace, 109 Ind. 284, 10 N. E. 111 (1886). Under the statutes of other states, he is entitled only to be admitted to bail. State v. Garthwaite, 23 N. J. Law, 143 (1851); In re Begerow, 136 Cal. 293, 68 Pac. 773, 56 L. R. A. 528 (1902).

Subject to the constitutional and statutory right to have a trial within a prescribed time, the court may fix the day of trial, provided a reasonable time is allowed defendant to prepare his defense. Jones v. State, 115 Ga. 814, 42 S. E. 271 (1902); Dunn v. People, 109 Ill. 635 (1884). If defendant goes to trial without objection, his right to time to prepare is waived. Fletcher v. State, 37 Tex. Cr. R. 193, 39 S. W. 116 (1897). It is within the sound discretion of the trial court to grant or refuse a continuance before the defendant has been placed in jeopardy. Commonwealth v. Buccieri, 153 Pa. 535, 26 Atl. 228 (1893).

[23] Part of this case is omitted.

Some courts hold it to be discretionary with the court whether it may refuse to allow a witness disobeying the order to be examined in the cause. Rex v. Colley, 1 Moo. & Malk. 629 (1829); State v. Fitzsimmons, 30 Mo. 236 (1860).

Some courts hold that where the disobedience of the order was uninten-

REGINA v. TANNER.

(Court of Queen's Bench, 1707. 2 Ld. Raym. 1284.)

In an information for a riot, the defendant pleaded not guilty, and the cause being carried down to Hertford assizes in Lent 1606–7 [sic], verdict for the queen. And motion was made to set aside the verdict: First, because the defendant gave no authority to the attorney to appear before him. Secondly, because he was an infant under eighteen, and ought to have appeared by guardian; and on reference to the master, it appeared there was an authority to plead; and as to the second, the course of the crown office is for infants in riots, &c. to appear by attorney. And so it was ruled, and the court refused to set aside the verdict. R. Raymond for the queen.

SIR WILLIAM WITHIPOLE'S CASE.

(Court of King's Bench, 1628. Cro. Car. 147.)

The first day of this Term William Withipole was arraigned upon an indictment of murder found in this vacation in Suffolk before commissioners of oyer et terminer, and certified hither by certiorari; and upon his arraignment he desired to have counsel to plead for him ore tenus, pretending he had matter in law to plead.

But The Court denied it, unless he would shew to them some exception in law, for which they should see cause to appoint him counsel; and then Mr. Holborn should be assigned for him: and The Court said, any other might be, though not assigned.[24] * * *

JEFFES' CASE.

(Court of King's Bench, 1629. Cro. Car. 175.)

Jeffes was indicted, for that he exhibited an infamous libel, directed to the king, against Sir Edward Coke, late Chief Justice of the King's Bench, and against the said court, for a judgment given in the said court in the Case of Magdalen College, affirming the said judgment to be treason, and calling him therein "traitor, perjured judge," and scandalizing all the professors of the law, and containing much other scandalous matter; and fixed this libel upon the great gate at the entrance of Westminster Hall, and in divers other public places.

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tional, and not brought about by the party in whose behalf he is to testify, it is error to exclude his testimony. State v. Thomas, 111 Ind. 575, 13 N. E. 35, 60 Am. Rep. 720 (1887); Parker v. State, 67 Md. 329, 10 Atl. 219, 1 Am. St. Rep. 387 (1887).

[24] Part of this case is omitted.

And being hereupon arraigned, he prayed that counsel might be assigned him; which was granted, and he had them, but would not be ruled to plead as they advised; but put in a scandalous plea, and insisting upon it, affirmed that he would not plead otherwise.

Whereupon it was adjudged, he should be committed to the marshal, and that he should stand upon the pillory at Westminster and Cheapside with a paper mentioning the offence, and with such a paper be brought to all the courts at Westminster, and be continued in prison until he made his submission in every court, and that he should be bound with sureties to be of good behaviour during his life, and should pay a thousand pounds fine for that offense to the king.[25]

ANONYMOUS.

(Upper Bench, 1652. Style, 367.)

Boynton moved for a Deer-stealer that was convicted at the Sessions in London upon an Endictment preferred against him upon the late Act made against stealing of Deer, and removed hither by a Habeas Corpus, that the Return might be filed, and took this Exception, viz. That it appears not in what Parish the offence was committed, as it ought to doe.

Roll, Chief Justice. Here is a conviction and a judgment in the Case, and the party is in Execution, and therefore bring your writ of Error if the judgment be erroneous, for we will not overthrow it for a fault in the return of the Habeas Corpus. But because it did appear to the Court that the party was convicted behind his back, they moved the Counsel to advise of a way how he may come to a fair tryal for the satisfaction of the party, and of the people; for it is a hard case, and let the Marshal take him in the mean time, and we will also advise.

REG. v. TEMPLEMAN.

(Court of Queen's Bench, 1702. 1 Salk. 55.)

Upon a motion to submit to a small fine, after a confession of the indictment which was for an assault. * * *[26]

Defendants may submit to a fine, though absent, if they have a clerk in Court that will undertake for the fine. Hil. 2 Anne, Hickeringil's Case was, that he and his daughter were indicted for a trespass, and Hickeringil only appeared on the motion to submit to a small fine. But where a man is to receive any corporal punishment, judgment cannot be given against him in his absence, for there is a capias pro fine; but no process to take a man and put him on the pillory. Vide tit. Judgments, Duke's Case.[27]

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[25] "At the present day a prisoner is allowed counsel to instruct him what questions to ask, or even to ask questions for him with respect to matters of fact, and to cross-examine the witnesses for the crown, and to examine those produced on the part of the defendant, though not to address the jury." 1 Chitty, Cr. Law, 408 (1816). In the United States the federal Constitution (Amend. art. 6) and many state Constitutions or statutes guarantee the right of defendant to counsel. State v. Arlin, 39 N. H. 179 (1859); State v. Moore, 61 Kan. 732, 60 Pac. 748 (1900). This right may be waived. Barnes v. Commonwealth, 92 Va. 794, 23 S. E. 784 (1895).

[26] Part of this case is omitted.

HOPT v. PEOPLE OF THE TERRITORY OF UTAH.

(Supreme Court of the United States, 1883. 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262.)

HARLAN, J.[28] The plaintiff in error and one Emerson were jointly indicted in a court of Utah for the murder, in the first degree, of John F. Turner. Each defendant demanded a separate trial, and pleaded not guilty. Hopt, being found guilty, was sentenced to suffer death. The judgment was affirmed by the Supreme Court of the territory. But, upon writ of error in this court, that judgment was reversed, and the case remanded, with instructions to order a new trial. 104 U. S. 631, 26 L. Ed. 873. Upon the next trial, the defendant being found guilty, was again sentenced to suffer death. That judgment was affirmed by the Supreme Court of the territory. We are now required to determine whether the court of original jurisdiction in its conduct of the last trial committed any error to the prejudice of the substantial rights of the defendant.

1. The validity of the judgment is questioned upon the ground that a part of the proceedings in the trial court were conducted in the absence of the defendant. Cr. Code Proc. Utah, § 218, provides that "if the indictment is for a felony the defendant must be personally present at the trial; but if for a misdemeanor the trial may be had in the absence of the defendant; if, however, his presence is necessary for the purpose of identification, the court may, upon application of the prosecuting attorney, by an order or warrant, require the personal attendance of the defendant at the trial." The same Code provides that a juror may be challenged by either party for actual bias; that is, "for the existence of a state of mind which leads to a just inference in reference to the case that he will not act with entire impartiality." Sections 239, 241. Such a challenge, if the facts be denied, must be tried by three impartial triers, not on the jury panel, and appointed by the court. Section 246. The juror so challenged "may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry." Section 249. "Other witnesses

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[27] "This was, however, not of course, but only in the discretion of the court." Rex v. Harwood, 2 Str. 1088 (1728).

[28] Part of this case is omitted.

may also be examined on either side, and the rules of evidence applicable to the trial of other issues govern the admission or exclusion of evidence on the trial of the challenge." Section 250. "On the trial of the challenge for actual bias, when the evidence is concluded, the court must instruct the triers that it is their duty to find the challenge true, if in their opinion the evidence warrants the conclusion that the juror has such a bias against the party challenging him as to render him not impartial, and that if from the evidence they believe him free from such bias they must find the challenge not true; that a hypothetical opinion on hearsay or information supposed to be true is of itself no evidence of bias sufficient to disqualify a juror. The court can give no other instruction." Section 252. "The triers must thereupon find the challenge either true or not true, and their decision is final. If they find it true the juror must be excluded." Section 253.

It appears that six jurors were separately challenged by the defendant for actual bias. The grounds of challenge in each case were denied by the district attorney. For each juror triers were appointed, who, being duly sworn, were, "before proceeding to try the challenge," instructed as required by section 252 of the Criminal Code; after which, in each case, the triers took the juror from the courtroom into a different room and tried the grounds of challenge out of the presence as well of the court as of the defendant and his counsel. Their findings were returned into court, and the challenge, being found not true, the jurors so challenged resumed their seats among those summoned to try the case. Of the six challenged for actual bias, four were subsequently challenged by the defendant peremptorily. The other two were sworn as trial jurors, one of them, however, after the defendant had exhausted all his peremptory challenges. No objection was made to the triers leaving the courtroom, nor was any exception taken thereto during the trial. The jurors proposed were examined by the triers, without any testimony being offered or produced, either by the prosecution or the defense.

It is insisted, in behalf of the defendant, that the action of the court in permitting the trial in his absence of these challenges of jurors was so irregular as to vitiate all the subsequent proceedings. This point is well taken. The Criminal Code of Utah does not authorize the trial by triers of grounds of challenges to be had apart from the court, and in the absence of the defendant. The specific provision made for the examination of witnesses "on either side," subject to the rules of evidence applicable to the trial of other issues, shows that the prosecuting attorney and the defendant were entitled of right to be present during the examination by the triers. It certainly was not contemplated that witnesses should be sent or brought before the triers without the party producing them having the privilege, under the supervision of the court, of propounding such questions as would elicit the necessary facts, or without an opportunity to the opposite side for cross-examination. These views find some support in the further provision making it the duty of the court "when the evidence is concluded," and before the triers make a finding, to instruct them as to their duties. In the case before us the instructions to the triers were given before the latter proceeded with the trial of the challenges. But all doubt upon the subject is removed by the express requirement, not that the defendant may, but, where the indictment is for a felony, must be, "personally present at the trial."

The argument in behalf of the government is that the trial of the indictment began after, and not before, the jury was sworn; consequently that the defendant's personal presence was not required at an earlier stage of the proceedings. Some warrant, it is supposed by counsel, is found for this position in decisions construing particular statutes in which the word "trial" is used. Without stopping to distinguish those cases from the one before us, or to examine the grounds upon which they are placed, it is sufficient to say that the purpose of the foregoing provisions of the Utah Criminal Code is, in prosecutions for felonies, to prevent any steps being taken in the absence of the accused, and after the case is called for trial, which involves his substantial rights. The requirement is not that he must be personally present at the trial by the jury, but "at the trial." The Code, we have seen, prescribes grounds for challenge by either party of jurors proposed. And provision is expressly made for the "trial" of such challenges, some by the court, others by triers. The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of the defense may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins.

But it is said that the right of the accused to be present before the triers was waived by his failure to object to their retirement from the courtroom, or to their trial of the several challenges in his absence. We are of opinion that it was not within the power of the accused or his counsel to dispense with statutory requirements as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, "cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures merely upon their own authority." 1 Bl. Comm. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with, or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Comm. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the Legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution. For these reasons we are of opinion that it was error, which vitiated the verdict and judgment, to permit the trial of the challenges to take place in the absence of the accused.

* * *

Judgment reversed.[29]

PRINE v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1851. 18 Pa. 103.)

This was an indictment against John Prine and others, for burglary and larceny. The record set forth as follows: January 16, 1851, defendants being arraigned, plead not guilty, and put themselves on their country for trial, and the Attorney General similiter. January 16, 1851, jury called, impaneled, and sworn, and verdict, "guilty in manner and form as they stand indicted." "Defendants' counsel waived the presence of the prisoners, and, at request of defendants' counsel, jury polled, when they severally answered that they found the defendants guilty of the burglary of which they stand charged in the indictment."

January 25, 1851. The prisoners were sentenced as stated on the record.

It was, inter alia, assigned for error, that:

1. It does not appear from the record that the prisoners were present during the trial.

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[29] The principle of this case has been applied in many jurisdictions to trials for felony. State v. Smith, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4 (1886); People v. Beauchamp, 49 Cal. 41 (1874). The weight of authority, however, allows the accused to waive his right to be present during a trial for felonies not capital. State v. Kelly, 97 N. C. 404, 2 S. E. 185, 2 Am. St. Rep. 299 (1887); Commonwealth v. McCarthy, 163 Mass. 458, 40 N. E. 766 (1895); Price v. State, 36 Miss. 531, 72 Am. Dec. 195 (1858). Cf. Lynch v. State, 88 Pa. 189, 32 Am. Rep. 445 (1878).

2. The record shows that the prisoners were not present when the verdict was rendered by the jury.

3. It does not appear from the record that the prisoners were in court when sentence was pronounced upon them.

The opinion of the court was delivered, October 6th, by

GIBSON, C. J. It is undoubtedly error to try a person for felony in his absence, even with his consent. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence. Never has there heretofore been a prisoner tried for felony in his absence. No precedent can be found in which his presence is not a postulate of every part of the record. He is arraigned at the bar; he pleads in person at the bar; and if he is convicted, he is asked at the bar what he has to say why judgment shall not be pronounced against him. These things are matter of substance, and not peculiar to trials for murder. They belong to every trial for felony at the common law, because the mitigation of the punishment does not change the character of the crime. How could the court record them as facts, if the truth were not so? Our looseness in recording forms of procedure, especially in criminal cases—if we have any forms left—has grown till the knowledge of the principles of which they were the exponents, has been lost to the bench and the bar. More method sometimes appears in the record of a justice's judgment for a few dollars, than appears in the record of a conviction of murder. These irregularities strike our professional neighbors with special wonder. They have overborne resistance by force of numbers; but we have not yielded to them in the one case capital by our law. In a conviction of murder, we have required the substantive parts of a proper record to be set out so clearly as to be separable from the dross with which it is usually blended. This was in favorem vitæ. In other felonies, it is allowable to presume that everything was rightly done till the contrary appear; but when it is stated on the record positively that the prisoner was not present, we cannot shut our eyes to the fact. What authority had the prisoners' counsel in this instance, on the pretext of convenience, to waive their presence? In a criminal case, there is no warrant of attorney, actual or potential; for when a prisoner binds himself by an agreement which he is competent to make, it is entered on the record as his immediate act, and this is a sufficient reason why he should be in court to do those things which his counsel could not do for him. It is unnecessary, however, to speak of delegated authority; for the right of a prisoner to be present at his trial is inherent and inalienable. The record before us, therefore, is erroneous; but we direct that the prisoners be held to answer a fresh indictment.

Judgment reversed.

ADAMS v. STATE.

(Supreme Court of Florida, 1891. 28 Fla. 511, 10 South. 106.)

MABRY, J.[30] William Adams, the plaintiff in error, Ike Spanish and T. P. Bethea, were jointly indicted on the 26th day of February, A. D. 1891, at a term of the circuit court for Columbia county, Fla., for the murder of James Moore. * * *

The bill of exceptions shows that an objection was made by the counsel for the accused to the competency of Ike Spanish as a witness for the state, and pending the discussion of this question before the court the jury was sent from the courtroom. The officers who had the custody of the defendant, Adams, through mistake took him also from the courtroom, and carried him to jail. Counsel for the defendant then proceeded to discuss before the court the competency of Ike Spanish as a witness, and had proceeded about 10 minutes with the discussion in the absence of the prisoner, when his presence was missed. The state's attorney called the attention of the court to the absence of the prisoner, and thereupon the court requested the counsel for defendant to suspend his argument, which he did, at the same time excepting to the removal of the prisoner from the courtroom without his consent, and of his being deprived of a right guarantied by the Constitution.

On the return of the prisoner to the courtroom the judge requested his attorney, in order to save any difficulty that might arise by reason of the inadvertence, to commence anew his argument, and that the court would hear his views and authorities anew. Defendant, by his counsel, declined to say anything further, but insisted that his objection to taking the accused from the courtroom be noted. Without any argument further, either from defendant or the state, the court decided that the witness was competent to testify against the accused. It was early decided in this state, and has been rigidly adhered to in later decisions, that the prisoner has the right to be and in fact must be present during the trial of a capital case, and no steps can be taken by the court in his absence. Holton v. State, 2 Fla. 476, 500; Gladden v. State, 12 Fla. 562; Irvin v. State, 19 Fla. 872.

There is no doubt about the fact that the accused here was taken from the courtroom and remained out for at least 10 minutes during the discussion of the competency of a witness against him. He has the right to be present and to hear questions of law as well as questions of fact discussed, and in fact no steps can be taken in the case in his absence. The court must see in capital cases that the accused is present before any proceedings are taken in the case. The fact that the court directed the argument to be gone over again could not possibly restore the accused to the position of hearing what had already been said in his absence. * * *

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[30] Part of this case is omitted.

For the errors herein pointed out the judgment in this case must be reversed, and a new trial awarded.[31]

PEOPLE v. THORN.

(Court of Appeals of New York, 1898. 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368.)

HAIGHT, J.[32] * * * At the conclusion of the evidence taken upon the trial, the defendant's counsel requested the court to permit the jury to inspect the premises where the homicide was committed. The district attorney objected; and the court at first refused the request, but later, upon the request of the defendant's counsel, changed his ruling, and made an order for the inspection of the premises, first instructing the jury that "you are not, going from the courthouse there, while there, or returning, to converse among yourselves, or with any one else, touching any subject relating to this case; and, in addition, I admonish you that you are not to form or express any opinion upon any subject connected with the case; and I admonish the officers that they are not to converse with the jurors, or suffer anybody to converse with them, on any matter relating to this case." An officer was then sworn, in accordance with the provisions of the Code, and the jurors were conducted to the premises. The defendant's counsel waived the right of the defendant and of himself to go with the jury to the premises, and requested that the jury go without them. The inspection of the premises was then made in the absence of the defendant.

It is now contended that the inspection was a part of the trial, and the taking of evidence in defendant's absence, and that it was such an error as to necessitate the granting of a new trial. This question has already received attention in the courts of a number of our sister states, and in some of the lower courts of our own state. The conclusions reached by the courts of the different states are far from uniform. In some it is held that a view of the premises where a crime has been committed is a part of the trial, and is the taking of evidence, and that it cannot be done in the absence of the defendant. In other states it has been held to be no part of the trial, and not the taking of evidence, within the meaning of the Constitution or of the Bill of Rights.

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[31] In cases of felony it has been held that defendant must be present at the impaneling of the jury (Dougherty v. Commonwealth, 69 Pa. 286 [1871]), the swearing and examination of witnesses (Bearden v. State, 44 Ark. 331 [1884]; State v. Moran, 46 Kan. 318, 26 Pac. 754 [1891]), at the charge to the jury (Roberts v. State, 111 Ind. 340, 12 N. E. 500 [1887]), at the reception of the verdict (Summers v. State, 5 Tex. App. 365, 32 Am. Rep. 573 [1879]), and when sentence is given (French v. State, 85 Wis. 400, 55 N. W. 566, 21 L. R. A. 402, 39 Am. St. Rep. 855 [1893]).

[32] Part of this case is omitted.

The argument presented in the cases holding that a view of the premises is improper without the presence of the defendant is to the effect that the view of the jurors cannot be considered an idle ceremony, but must be deemed to have been made for a purpose, and, taking place under an order of the court, is a part of the trial; that the jurors, in making such inspection, necessarily made use of their sense of sight, and, although no word may be spoken, they draw conclusions from the silent, inanimate objects which they see; that these objects are mute witnesses with which the defendant must be confronted. This view was adopted in elaborate opinions by Justices Learned and Bockes, in the General Term, Third Department, in the case of People v. Palmer, 43 Hun, 401.

In the case of People v. Bush, 68 Cal. 623, 630, 10 Pac. 169, the same view was adopted, but by a divided court.

In the case of State v. Bertin, 24 La. Ann. 46, it was held that an examination of the premises where the crime was committed could not properly take place in the absence of the judge and the defendant; but in that state there was no statute authorizing a view of the premises.

In the case of Benton v. State, 30 Ark. 328, 350, it was held that the accused should be permitted to be present at the view.

In the case of Foster v. State, 70 Miss. 755, 763, 12 South. 822, the jurors were permitted to visit and inspect a railway car in which the homicide occurred. The right of the accused was first denied him by the court, but, as an act of grace on the part of the counsel for the state, the court gave the accused permission to accompany the jury. It was held that the judge erred; that the accused had a right to be present; and that it was not a matter of favor.

In the case of Rutherford v. Com., 78 Ky. 639, the court held that, in a trial for homicide, the prisoner and the judge should attend the inspection of the premises by the jury, but, it not appearing that the defendant was prejudiced by the inspection, the court refused to reverse the judgment.

In the case of Sasse v. State, 68 Wis. 530, 537, 32 N. W. 849, it was held that the knowledge acquired by the jury in inspecting the premises was to enable the jurors better to understand the evidence on the trial; that it was not to obtain original testimony in addition to, or contradiction of, or independent of, the evidence given in court, but to obtain a more perfect knowledge of the evidence, and to enable the jury better to understand and consider it, in the light and by the aid of the insensible objects and localities disclosed by the view.

In the case of Carroll v. State, 5 Neb. 31, it was held that, whenever the court makes an order that the jury view the place where a crime has been committed, such view should be made in the presence of the prisoner, unless he waives the privilege.

In Shular v. State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211, the court, on motion of the defendant's counsel, sent the jury to inspect the premises where the homicide was committed, and did not direct that the defendant should be present during the inspection; but no request was made by the defendant that he should be allowed to be present, nor was there a suggestion to the court that he desired to accompany the jury. The statute in that state permitted the inspection of the premises only upon the consent of the parties. This consent was given in open court, and the inspection took place in the absence of the defendant. Upon review it was contended that the inspection was a part of the trial, and was the taking of testimony.

Elliott, J., in delivering the opinion of the court, says: "This statute does not intend that the view of the premises where a crime was committed shall be deemed part of the evidence, but intends that the view may be had for the purpose of enabling the jury to understand and apply the evidence placed before it in the presence of the accused in open court. Deferring for the present a consideration of the authorities, and reasoning on practice, we shall have no difficulty in concluding that the statute does not intend that the inspection of a place where a crime was committed shall be taken as evidence. It cannot be seriously doubted that evidence can only be delivered to a jury in a criminal case in open court, and, unless there is a judge or judges present, there can be no court. The statute does not intend that the judge shall accompany the jury on a tour of inspection. This is so obvious that discussion could not make it more plain. The jury, are not, the statute commands, to be spoken to by any one save by the officer and the person appointed by the court, and they are forbidden to talk upon the subject of the trial. It is the duty of the jurors to view the premises, not to receive evidence, and nothing could be done by the defendant, or by his counsel, if they were present; so their presence could not benefit him in any way, nor their absence prejudice him. The statute expressly provides who shall accompany the jury, and this express provision implies that all others shall be excluded from that right or privilege. It is quite clear from these considerations that the statute does not intend that the defendant or the judge shall accompany the jury, and it is equally clear that the view obtained by the jury is not to be deemed evidence." * * *

If, as is contended, the view of the premises by the jurors is a part of the trial, or is the taking of testimony upon the trial, it may be that the view could not take place in the absence of the defendant; but we are not prepared to concede that the view is a part of the trial or is the taking of evidence. The trial could not take place in the absence of the judge, jury, and defendant, and yet the provision of the Code does not require the judge to attend upon the jury during the time that it is inspecting the premises. Courts are appointed to be held at the places designated by statute. In this case it was at the courthouse of the county. Courts may be adjourned to be held in other places if a malignant, contagious, or epidemic disease exists at the place where the term of a court of record is appointed to be held; but nothing has occurred in this case necessitating the transfer of the trial from the courthouse to a cottage in Woodside. It therefore seems clear that the Legislature never contemplated that the view of the jurors provided for should be in court and a part of the trial.

Is it the taking of evidence? The provision in the Bill of Rights that the accused shall be confronted with the witnesses against him was designed to prevent secret trials in which the accused was often arrested and executed without a hearing, and without any knowledge as to who were his accusers, or the evidence upon which they relied. The provision had reference to the persons who should testify against him. It is doubtless true, as claimed, that jurors may draw inferences from the objects which come under their vision. While mute, inanimate objects may, in one sense, be witnesses, are they witnesses within the contemplation of the Constitution and the statute? We think not. If seeing the locality is the taking of evidence in one case, it must be in another. If viewing the locality during the trial is the taking of testimony, why is not the seeing of the locality before the trial the taking of testimony?

It often occurs that crimes are committed in public places, familiar to the greater portion of the inhabitants of a county, where it would be difficult, if not impossible, to procure a jury which had not seen the locality time and time again. Such persons, having seen the locality, and being familiar with it, could, if they were sitting upon a jury, readily determine whether a witness was accurately describing the place. Their knowledge of the locality would constantly operate upon their minds during the trial in determining the force and effect which should be given to the testimony. If seeing is the taking of evidence, it would follow in every case that a juror who had seen and was familiar with the locality would be incompetent to sit as a juror, for he would have taken testimony in the absence of the accused, with which he had never been confronted, or had an opportunity to explain. To illustrate further: In front of this Capitol, in the city of Albany, there is a park. On the opposite side of the park stands the courthouse. Should a felony be committed in the park, the accused could not well be brought to trial, for the reason that every juror summoned in the case necessarily would see and view the locality every time he entered or departed from the courthouse.

These are some of the absurd results which would naturally follow the construction contended for. Our minds do not incline that way. Every reasonable safeguard provided by the Constitution or the Bill of Rights for the protection of persons accused of crime should be scrupulously recognized and preserved by the courts; but we should not attempt to deprive the jury of the means of determining the truth or falsity of the testimony of witnesses, or to so surround criminal trials with technical and profitless restrictions as to make it difficult, if not impossible, to reach a verdict that can be upheld. It appears to us that the more rational and reasonable construction to be given to the provisions of the section is that the view is not the taking of testimony within the meaning of the Bill of Rights; but that the sole purpose and object of the view is to enable the jurors to more accurately understand and more fully appreciate the testimony of witnesses given before them. The wise and beneficent object of the statute should not be lost sight of.

Trial judges should be careful to see that the purpose of the statute is not departed from, and the view used for other purposes than that contemplated. The statute has left it discretionary with the trial judge as to whether the view should be had. In exercising this discretion, we think that he should first satisfy himself that the premises are in substantially the same condition as at the time of the commission of the crime under investigation, and that the view should be taken by the jury attended only by the officers or persons selected by the court to exhibit the premises. If the defendant and his counsel and the district attorney wish to accompany the jury, we think it but reasonable that they should be permitted to do so; but the jurors should be carefully guarded, and no one permitted to speak to them, in violation of the provisions of section 412, or other misconduct permitted. If the jurors be permitted to converse with outside persons with reference to the particulars of the crime, or should make inquiries with reference to material questions at issue, it would be misconduct, within the Gallo Case, supra, which this court would feel bound to consider upon a review.

As we have seen, the prisoner's counsel asked that the jurors be permitted to view the premises, and waived the right of himself or the defendant to be present. If the view was not a part of the trial, or the taking of evidence, within the contemplation of the Constitution and the statute, there can be no doubt about the power of the defendant to waive his presence. People v. Johnson, 110 N. Y. 134, 17 N. E. 684; People v. Court of Oyer and Terminer, 101 N. Y. 245, 4 N. E. 259, 54 Am. Rep. 691. Whether he could waive the right to be present if it were a part of the trial and the taking of evidence, we need not now consider. * * *

Parker, C. J., and Gray, Martin, and Vann, JJ., concur with Haight, J., for affirmance. Bartlett, J., concurs with O'Brien, J., for reversal.

Judgment and conviction affirmed.[33]

[33] "While there is some conflict of authority upon the question, there is a great preponderance in favor of the proposition that, under such provisions, the absence of the accused at the hearing and decision of a motion for a change of venue, or continuance of the case, at the hearing and decision on motion in arrest of judgment, or at the hearing and decision of a demurrer to the indictment, will not vitiate the judgment in a case of felony; that it is not essential that the accused should be present at the filing and trial of motions and pleas not involving the question of guilt or innocence on the merits." Baskin, J., in State v. Woolsey, 19 Utah, 491, 57 Pac. 428 (1899).

PEOPLE v. BLACKMAN.

(Supreme Court of California, 1899. 127 Cal. 248, 59 Pac. 573.)

PER CURIAM.[35] Defendant was convicted of a felony. Upon the hearing of the motion of defendant for a new trial two affidavits were read in its support, made by two different persons, who were present at the trial. In substance, they deposed that, after the court had instructed the jury, and while the district attorney was addressing the jury, the presiding judge left the bench and the courtroom, and went into another room, closed the door behind him, and was absent from the courtroom about 10 minutes, during which time the district attorney proceeded with his argument to the jury upon the facts of the case. No affidavit disputing these facts or explaining the absence of the judge was made by any one. Defendant's affidavits were filed with the notice of motion for a new trial, and when the motion came on to be heard, and the affidavits were read, the court made the following remark: "What! What! The court knows of its own knowledge that it was not absent any such time, or in any such manner, and was not out of hearing of counsel while arguing said cause at any time, and that the door of my chamber was open at that time, and even when the door is shut I can hear all that is going on in the courtroom."

The Attorney General cites Southern California Motor-Road Co. v. San Bernardino Nat. Bank, 100 Cal. 316, 34 Pac. 711, in which the court quotes from a Nevada case "that in all motions before a judge during the progress of the trial he may act on his own knowledge in regard to things which, in their nature, are better known to himself than they could be to others." The motion in both these cases was for transfer of the place of trial upon the ground that the judge was interested in the cause, and in the case in 100 Cal. 316, 34 Pac. 711, the affidavit was not to the fact that the judge was disqualified by reason of interest (giving the disqualifying facts), but it was that, as affiant was informed and believed, the judge had said he considered himself disqualified. It has been held here recently that a motion to transfer a cause on the ground of the bias of the judge must be decided on affidavits (People v. Compton, 123 Cal. 403, 56 Pac. 44), so that the above rule does not apply in that kind of a case; nor do we think it would apply where the facts as shown clearly disqualify the judge as interested in the cause of action. The judge's belief cannot overcome the legal conclusion to be drawn from the facts.

The Attorney General also claims that the statement of the judge from the bench must be received as a refutation of the facts set forth in the affidavits. We are not called upon to decide whether the statement of the court is to be received as the equivalent of an affidavit in all cases, or whether the rule in the case of People v. Compton, supra, applies, as is claimed by defendant. The facts stated in the affidavits were not, in their nature, better known to the judge than to others in the courtroom—the sheriff, the clerk, counsel, and bystanders. If the statements were untrue, the fact could have been easily so shown by affidavit. But the statement of the judge, treated as an affidavit, and given its full effect as such, does not controvert the affidavits presented with the motion in all their essential facts. In People v. Tupper, 122 Cal. 424, 55 Pac. 125, 68 Am. St. Rep. 44, the court said: "The judge is a component part of the court. There can be no court without the judge. And all that was done in the absence of the judge was done in the absence of the court. A defendant convicted under such circumstances has been deprived of his liberty without due process of law." In State v. Beuerman, 59 Kan. 586, 53 Pac. 874, cited in the above case, it was said: "He [the judge] cannot even temporarily relinquish control of the court or the conduct of the trial. * * * It is especially important that he should be visibly present every moment of the actual progress of a criminal trial, where the highest penalty of the law may be imposed. * * * If the presiding judge abandons the trial, or relinquishes control over the proceedings, the accused has good cause to complain"—citing numerous cases.

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[35] Part of the opinion is omitted.

Admitting all the judge said to be true, there is not in the statement sufficient to disprove the fact. Indeed, it inferentially concedes that he relinquished control of the case for the time. Something more is required of the presiding judge than that he should be within hearing. That might be true if he were on the street, and the windows of the courtroom open; and it may be true in this case, as the judge stated, that when in the adjoining room, with the doors shut, he "can hear all that is going on in the courtroom," but it must be obvious that he would be in no position to have control of the proceedings, and certainly would not be presiding in the cause when in an adjoining room, with the door open or shut. If any misconduct took place in the courtroom during such absence, there would be no judge present to whom defendant's counsel could make complaint, or to determine what occurred in his absence. Upon the authority of People v. Tupper we must hold the conduct of the judge to be prejudicial error.

* * *

The judgment is reversed, and the cause remanded for a new trial.

ROWE v. PEOPLE.

(Supreme Court of Colorado. 1899. 26 Colo. 542, 59 Pac. 57.)

Goddard, J.[37] * * * The third and last ground relied on for reversal is that the trial judge absented himself from the courtroom

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[37] Part of the case is omitted.

"The inclination of the courts has been to hold that, when it is necessary for the conduct of the trial that one should act as judge, he may not be during the closing argument of the district attorney, and that during such absence the district attorney used improper language in addressing the jury. The language that is alleged to have been improper is not preserved in the bill of exceptions. We are unable, therefore, to determine whether this objection is meritorious or not.

The alleged absence of the judge from the courtroom consisted in his leaving the bench, and going into his room, which was but a few feet away, and is explained by the judge himself, in passing upon the motion for new trial, as follows: "I will say, in regard to that part of the argument of the district attorney of which complaint is made by counsel for defendants, that while I stepped into my room here a few feet, stepping but a few feet away from my desk here, at the time counsel for the defendants interposed an objection to the remarks of the district attorney, that, aside from calling my attention to the statements made by Mr. Patton, he made no further reference to it, and did not except to the argument as made by the district attorney. * * * The discussion by the district attorney of the evidence in this case was perfectly fair. I heard every word spoken by him. No reference was made to the fact that the defendants were not placed upon the stand to testify. * * * Consequently, I will say there is no justification for the sixth assignment of error in this case."

From this statement of the court, it is obvious that, if counsel had taken the proper steps to present this objection, there is no foundation for this assignment of error. The absence of the judge from the bench was not such as would constitute reversible error. O'Brien v. People, 17 Colo. 561, 31 Pac. 230. Upon a careful inspection of the record before us, we are unable to find any error that would justify a reversal.

The judgments of the court below are accordingly affirmed.

SECTION 5.—CONDUCT OF THE TRIAL

STATE v. WILCOX.

(Supreme Court of North Carolina, 1902. 131 N. C. 707, 42 S. E. 536.)

Montgomery, J. "No person ought to be taken or disseised of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property but by the law of the land."

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called from the bench to be examined as a witness; but when his action as a judge is not required, because there is a sufficient court without him, he may become a witness, though it is then decent that he do not return to the bench." Folger, J., in People v. Dohring, 59 N. Y. 379, 17 Am. Rep. 349 (1874).

See, also, Hacker's Case, Kelyng, 12 (1660); Hinman v. People, 13 Hun (N. Y.) 266 (1878).

And that provision of our state Constitution applies as well to the procedure and manner of trial in our courts of justice as it does to the great principles of law which underlie our society. Under the law of the land, all persons charged with crime are as much entitled to a fair and unprejudiced trial as they are to the protection of their persons, their property, or their reputation. They have the right, under the same Constitution, to have counsel for their defense; and any willful interruption of such counsel while conducting such defense, intended to disconcert and embarrass, is not only unlawful as obstructing and preventing a fair trial, but is deserving of the condemnation of all good citizens.

In this case the prisoner was arraigned on an indictment for murder, and was convicted of that crime in the first degree. The evidence was entirely circumstantial, and, while that character of evidence may, in its very nature, produce a high degree of moral certainty in its application, yet it is never to be forgotten that it requires the greatest degree of caution and vigilance in its application. In reading the record in this case, it hardly seems possible that the jury could have given that cautious and vigilant attention to the evidence which the law required of them, or to the presentation of the prisoner's case to them by his counsel that thought which the importance of the case demanded. In their immediate presence 100 people, in their deliberate purpose to prejudice the rights of the prisoner, committed a great wrong against the commonwealth, and a contempt of the court. On the outside of the courthouse greater improprieties took place for the purpose of prejudicing the prisoner with the jury. No such demonstrations were ever witnessed in our state before, and, for the honor of the commonwealth, such ought never to be repeated.

In the statement of the case by his honor he said: "After the evidence was all in, and while one of the counsel was making the closing argument for the prisoner, about one hundred people, being about a fourth of those present in the courtroom, as if by concert, left the room. Soon thereafter, while the same counsel was addressing the jury, a fire alarm was given near the courthouse, which caused a number of other persons to leave the courtroom. The court is of opinion, and so finds the fact, that these demonstrations were made for the purpose of breaking the force of the counsel's argument. But the court does not find that the jury were influenced thereby. There is no motion made by the prisoner to set aside the verdict in consequence of said conduct."

Sufficient excuse was made here by the counsel for the prisoner for the failure to make the motion for a new trial in the court below to justify the Attorney General in consenting to an agreement to consider the motion as having been entered at the proper time, which he did. In such a case as this it was not indispensable that a finding by his honor that the jury had been influenced by the conduct of the offenders should have been made. The disorderly proceedings assumed such proportions as to warrant this court in declaring that the trial was not conducted according to the law of the land. The propriety of our ruling is strengthened by the circumstances that contempt proceedings were not commenced against those offending, and that no motion was made to set the verdict aside and for a new trial after such unheard of demonstrations.

The counsel for the prisoner, in his argument here, in response to a question stated that, if the verdict had been set aside, the prisoner would have met a violent death on the instant. The prisoner must not only be tried according to the forms of law, these forms being included in the expression "the law of the land," but his trial must be unattended by such influences and such demonstrations of lawlessness and intimidation as were present on the former occasion. The courts must stand for civilization, for the proper administration of the law in orderly proceedings. There must be a new trial of this case.

New trial.

CLARK, J. (concurring). The judge having found as a fact that the demonstrations within and without the courtroom were made "for the purpose of breaking the force of the counsel's argument," the magnitude and nature of those demonstrations were such as to require a new trial. The administration of justice must not only be fair and unbiased, but it must be above any just suspicion of any influence, save that credit which the jury shall give to the evidence before them. It is of vital importance to the public welfare that the decisions of courts of justice shall command respect, but this will be impossible if there is ground to believe that extraneous influence of any kind whatever has been brought to bear.

PEOPLE v. MURRAY.

(Supreme Court of Michigan, 1891. 89 Mich. 276, 50 N. W. 995, 14 L. R. A. 809, 28 Am. St. Rep. 294.)

CHAMPLIN, C. J. * * * The first clause of section 28 of article 6 of the Constitution reads as follows: "In every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury." The right to a public trial is one of the most important safeguards in the prosecution of persons accused of crime.

* * *

In this case it is apparent that the constitutional rights of Murray were violated in the order of the court to the police officer stationed at the door of the courtroom "that he should stand at the door, and see that the room is not overcrowded, but that all respectable citizens be admitted and have an opportunity to get in whenever they shall apply." It is shown beyond question that during the whole trial the courtroom was not overcrowded, nor were the seats provided for spectators occupied to any great extent. This officer was under the control of the court, and when the court was informed that he was excluding citizens and taxpayers he refused to take any notice of the complaint, and left the officer to exercise his discretion as to what respectable citizens he should admit.

Is respectability of the citizen who desires to witness a trial to be made a test of the right of access to a public trial, and is that test to be left to the knowledge or discretion of a police officer? Must a citizen who wishes to witness a trial of a person accused, whether he be a friend, an acquaintance, or a stranger to the accused, present to the police officer stationed at the door of the Temple of Justice a certificate of his respectability? If so, by whom shall it be certified? By the mayor, the chief of police, or police commissioners, or by his pastor or clergyman? Neither the Constitution nor the law requires any such preposterous condition to the admission of a citizen to attend and witness a trial, either civil or criminal.

The order of the court stationing the policeman at the door, with directions to admit none but respectable citizens, was not only a violation of the Constitution, but it was a direct violation of the public statutes of this state. Section 7244 of Howell's Annotated Statutes enacts: "The sittings of every court within this state shall be public, and every citizen may freely attend the same." This statute has been in force since 1846. It voices the sentiment of the people at the time the Constitution of 1850 was adopted. It gives expression to what is there meant by a public trial. Courts have no dispensing power when the Legislature has spoken. The judge who presided at the trial of this case was as much bound by this provision of law as the humblest citizen. The trial may have been an impartial one; the respondent may have been justly convicted; but it still remains that it was accomplished in violation of his constitutional and statutory right to a public trial.

Edmund Burke never expressed a more important truth, when speaking respecting the suspension of habeas corpus at the time of the American Revolution, than when he said: "It is the obnoxious and suspected who want the protection of the law." Courts of final resort cannot consider the question whether the respondent was justly convicted or not in passing upon questions of law presented for their consideration. It is for the protection of all persons accused of crime—the innocently accused that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial—that one rule must be observed and applied to all. * * *

Three authorities are cited in support of the action of the judge. One is the case of State v. Brooks, 92 Mo. 573, 5 S. W. 257, 330. In that case in the opinion handed down by the Supreme Court it was said that an objection was taken that the defendant did not have a public trial, and the court said: "This claim was based on the fact that during the early stages of impaneling the jury two men were stationed, on the afternoon of one day and the forenoon of the next day, at the door of the courtroom, who refused to admit any one into the courtroom except jurors, witnesses, or officers of the court, or those having business in court. It appears that, when this matter was brought to the attention of the court, the court stated that no order had been made stationing men at said door, and announced that any one who wished to come into the courtroom could do so, and made an order that all persons be admitted until the seats were full. Had the court either refused to make such an order, or if, after making it, had refused a request on the part of the defendant that jurors examined touching their qualifications while the men were stationed at the door should be re-examined, this might have afforded some ground for the complaint made; but no such request was made."

This is not in any respect a parallel case to the one under consideration. In the Brooks Case the exclusion of the public only continued through the afternoon of one day and the forenoon of the next. In Murray's Case it lasted during the entire trial of two weeks. In the Brooks Case, when the matter was called to the attention of the court, the court stated that no order had been made stationing a man at the door, and announced that any one who wished to come into the courtroom could do so, and made an order that all persons be admitted until the seats were filled. In Murray's Case the court made the order stationing the policeman at the door to see that all respectable citizens be admitted; that his attention was called to the fact that respectable citizens and taxpayers were refused admission, and, instead of making an order that all citizens be admitted until the room was filled, he said that "the officer has got his orders, and they are in accordance with the law, as I take it, and if you have any objection you will have to take it in some other way than by exception. Proceed with the trial." The judge's position in Murray's Case finds no support whatever in the Brooks Case.

We are also cited to the case of People v. Kerrigan, 73 Cal. 223, 14 Pac. 849. In that case the defendant was convicted of an assault with intent to commit murder. The defenses interposed at the trial were, "not guilty," and "insanity." During the progress of the trial in the court below the defendant became greatly excited, and indulged in profane and abusive language, addressed to the court and other officers of the court. Her conduct created so much commotion among the spectators that the trial was seriously interrupted, and the court found it necessary to make an order excluding spectators from the courtroom. * * * Neither is this case an authority for what was done in Murray's Case. The court did not order the courtroom to be cleared of spectators, but the lobby outside. There is nothing in the facts of that case which assimilate in any degree to the trial of Murray. Here no violence is shown, no disorderly conduct, no violent or disgraceful action on the part of Murray, which tended to lessen the dignity of the court, or bring the administration of justice into disrepute.

I cannot accede to the correctness of the proposition intimated in that case that, if a public trial has not been accorded to the accused, the burden is upon him to show that actual injury has been suffered by a deprivation of his constitutional right. On the contrary, when he shows that his constitutional right has been violated, the law conclusively presumes that he has suffered an actual injury. I go further, and say that the whole body politic suffers an actual injury when a constitutional safeguard erected to protect the rights of citizens has been violated in the person of the humblest or meanest citizen of the state. The Constitution does not stop to inquire of what the person has been accused or what crime he has perpetrated; but it accords to all, without question, a fair, impartial, and public trial. * * *

It is also urged that in this case the prisoner was accorded a public trial, for the reason that there were several other ways of obtaining ingress to the courtroom than that in which the public generally entered. The learned judge returns to the writ of certiorari "that there were several doors for ingress and egress accessible to persons wishing to visit the said court at all times." But this is a mere subterfuge. There was a public entrance, at which the public applied for admission and were refused, as is shown by the affidavits, or one of them, that one of the persons, knowing of the private entrance through the clerk's office, entered in that manner, after being refused admission at the public entrance. It is not usual for the public to pass through these private entrances into the courtroom, and it is no answer for the court to say that, although he stationed a policeman at the door of the public entrance, there were other ways of ingress to persons who wished to gain admission. We have no hesitation in saying that the prisoner was denied the right of a public trial, and the proceedings in consequence must be declared a mistrial, and his conviction must be set aside, and a new trial must be had.

We are asked to discharge the prisoner, on the ground that he has been once in jeopardy, and cannot, therefore, be tried again. The question is a serious one, and we have considered it with care. The judgment and conviction are set aside in this case on a proceeding instituted by the prisoner, and is to be treated as if the judgment had been arrested on his own motion, and the judgment and verdict set aside. In such cases the plea of former jeopardy cannot avail. State v. Hays, 2 Lea (Tenn.) 156; State v. Walters, 16 La. Ann. 400; State v. Redman, 17 Iowa, 329; People v. Casborus, 13 Johns. (N. Y.) 351; State v. Norvell, 2 Yerg. (Tenn.) 24, 24 Am. Dec. 458; Com. v. Hatton, 3 Grat. (Va.) 623; State v. Clark, 69 Iowa, 196, 28 N. W. 537; Gerard v. People, 3 Scam. (Ill.) 362; People v. Barric, 49 Cal. 342; People v. Olwell, 28 Cal. 456; Morrisette v. State, 77 Ala. 71; People v. Helbing, 61 Cal. 620; Johnson v. State, 29 Ark. 31, 21 Am. Rep. 157; People v. White, 68 Mich. 648, 37 N. W. 34; People v. Price, 74 Mich. 37, 44, 41 N. W. 853; Bish. Crim. Law, §§ 1004, 1016.

In Hill v. People, above referred to, one of the jury who convicted the prisoner was an alien, and therefore disqualified, and it was held that his conviction was a violation of section 28, art. 6, of the Constitution. The respondent in that case moved for a new trial upon that ground. This court in reversing the judgment ordered a new trial.

The judgment must be reversed, the prisoner must be remanded to the custody of the sheriff for the county of Wayne, and a new trial is ordered.

MORSE, LONG, and MCGRATH, JJ., concurred with CHAMPLIN, C. J.

GRANT, J. I concur with my Brother CHAMPLIN in his opinion that the respondent was not accorded a public trial within the meaning of the Constitution and the laws of this state, but I cannot concur with him in holding that the writ of certiorari was the proper way to bring the case to this court. * * * [38]

STATE v. NYHUS.

(Supreme Court of North Dakota, 1909. 124 N. W. 71.)

MORGAN, C. J.[39] * * * The trial court, after a jury had been impaneled and sworn, made the following orders: "On motion of the state's attorney, it is ordered, in view of the nature of this case, it being what is commonly known as scandalous matter, that all persons be excluded from the room save and except the following named persons: All jurors, officers of the court, including attorneys, litigants, and their attorneys, witnesses for both parties, and any other person or persons whom the several parties to the action may request to remain." The court had previously made an order excluding all witnesses from the courtroom until after they had been examined, except the witnesses for the defendant, who were permitted to be present during the progress of the state's case. The statement of the case shows that there was no objection to the order limiting the attendance of persons that were permitted to be present in the courtroom. It also appears in general terms "that the order was carried into effect and enforced" until the commencement of the arguments to the jury at the close of the testimony. The statement of the case also contains the following recital: "During the course of the trial several members of the bar were present from time to time, and one other person not included in the above order was also present part of the time by special invitation of the presiding judge."

The defendant contends that, by the making and enforcement of the above order, he was deprived of his constitutional right to a public trial. It is noticeable from a reading of the record, as above recited, that it does not appear that any person was excluded from or refused admittance to the courtroom who was within the terms of the order that was made, nor does it appear from the record that any one was refused admission to the courtroom except by an inference from the statement in the record that the order was enforced. It is not shown in any manner how many persons were admitted under the order, or how many were in attendance upon the trial, what was the seating capacity of the courtroom, and whether the seats were filled and the courtroom crowded or otherwise, does not appear. It does not appear how many jurors were in attendance at said term, nor how many witnesses, nor how many attorneys, nor how many litigants. It is not shown whether the defendant requested any one to be present, nor is it shown that he desired any one to be present, nor is it shown that any one was refused admittance, coming within any of the classes of persons that were permitted to attend. No restrictions were placed upon the number of persons that were permitted to remain at the request of the defendant.

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[38] Part of the opinions of Champlin, C. J., and Grant, J., are omitted.

[39] Part of this case is omitted.

It is contended in the argument that the order only permitted the defendant to make a request that certain persons who were present in the courtroom when the order was made might remain upon his request; in other words, it is contended that he was not permitted to request the attendance of any person at any later session after the making of the order. We do not think this to be a reasonable construction of the order. We think it was the intention of the trial court to permit the defendant to request any person to attend during the whole trial, and remain during any sitting of the court, and to be admitted at all sessions if his presence was desired and requested by the defendant.

In view of the meager showing as to attendance at the trial under the restrictions of the order, we cannot say, nor intimate, that the trial was not public within the meaning of the constitutional provision. If every one attended that the defendant desired to have present and all others attended that could have attended under the provisions of the order, we cannot say that the trial was not public. Every one who had business or duties in the courtroom, and every one that the defendant or state's attorney might request to be present, was permitted to be present. There is no contention nor room for contention that the order did not give the defendant the same privileges that were accorded the state's representative. There was no favoritism shown to the state nor to the defendant. It is not shown that any one was excluded by reason of the order, except by inference, as above stated.

The Constitution of this state guarantees to all persons accused of crime a a speedy and public trial. These provisions are for the benefit of the accused. They were enacted to forever make it impossible for public prosecutors or courts to continue the evils of secret trials as they formerly existed. These prohibitions or guaranties are construed generally to have been enacted to prevent secret trials, and public trials in the literal sense of those words have never been construed to be granted by these provisions. It is never contended that the state is burdened by these provisions with the duty of providing courtrooms of sufficient capacity to accommodate every one who may wish to be present at trials. These provisions are held to be subject to a reasonable construction, and circumstances may arise where certain portions of the public may be excluded without impairing the defendant's rights under these provisions. For instance, it is conceded by text-writers and courts generally that persons of immature years may be excluded from the courtroom during the trial where the evidence relates to scandalous, indecent, or immoral matters. Furthermore, the courtroom may be cleared to prevent interference with, or obstruction of, the due administration of justice.

The orderly conduct of the courts in the administration of justice is deemed to warrant the exclusion of the public from trials where those present conduct themselves in a manner tending to obstruct justice, or tending to give either the state or the defendant an unfair trial. It is deemed better to limit the right to a public trial than that the trial may be conducted in such a manner by reason of those present that the rights of the parties may be prejudiced. Grimmett v. State, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630; State v. Hensley, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277, 116 Am. St. Rep. 734; Lide v. State, 133 Ala. 43, 31 South. 953. * * *

In State v. Hensley, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277, 116 Am. St. Rep. 734, supra, the court in declaring an order excluding all persons, except the jury, defendant's counsel, members of the bar, newspaper men, and one other person who was a witness for the defendant, said: "Perhaps, too, the character known as the 'courtroom loafer' whose attendance would be induced only by prurient curiosity, might be excluded without harm to the defendant, or prejudice to the state, although the matter of determining with certainty just who should and who should not be included in this category in the given instance, might not always be easy of solution, but should be, and, we think, necessarily and properly, left to the trial judge, who is obliged to insist upon the orderly conduct of public business, and whose highest duty is securing to the parties, the defendant as well as the state, a fair and impartial trial; but the people have a right to know what is being done in their courts, and free observation and the utmost freedom of discussion of the proceedings of public tribunals that is consistent with truth and decency tends to public welfare." The court, however, held that the order in that case was too restrictive, and deprived the defendant of his constitutional right. It is to be observed, however, that the order in that case was much more restrictive than the one under consideration.[40] * * *

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[40] The judgment was reversed on other grounds.

PEEPLES v. STATE.

(Supreme Court of Georgia, 1898. 103 Ga. 629, 29 S. E. 691.)

LUMPKIN, P. J.[41] * * * In ruling upon certain questions arising during the trial, the judge made remarks which were objectionable, and calculated to prejudice the case of the accused. We will call attention to two of these:

The accused having moved for a continuance on the ground of an absent witness, viz. his son, Drew Peeples, and having sworn that this witness was not absent with his knowledge or by his procurement or consent, the judge, in the presence of those from whom the jury was to be selected, remarked, in this connection: "I will pass this case until a quarter after 1 this evening. Capt. Peeples [meaning the accused] can get Drew Peeples here, if he wants him." Again, in ruling upon the question discussed in the first division of this opinion, the judge alluded to the efforts of counsel to introduce the testimony therein referred to as being unnecessary, because they consumed time "in taking wild goose chases all over the country in these things." There was no occasion for making remarks of this kind, and their effect upon the prisoner's case could not have been otherwise than harmful. * * *

Judgment reversed. All the Justices concurring, except COBB, J., absent from providential cause.[42]

STATE v. DUESTROW.

(Supreme Court of Missouri, 1897. 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.)

SHERWOOD, J.[43] * * * 8. No error occurred in the remarks made by the court to one of counsel for defendant, "Take as much time as possible," and "I think you are reading for your own amusement." These remarks were brought out by an exceedingly prolix and extended cross-examination of Dr. Bauer, and it was not improper for the court in this way to rebuke the wholly unnecessary consumption of time. And, in any event, no prejudice could occur to defendant by reason of such remarks. State v. Musick, 101 Mo., loc. cit. 273, 14 S. W. 212. * * *

We therefore affirm the judgment, and direct that the sentence pronounced by the law be executed. All concur.[44]

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[41] Part of this case is omitted.

[42] See, also, People v. Abbott (Cal.) 34 Pac. 500 (1893); State v. Clements, 15 Or. 237, 14 Pac. 410 (1887).

[43] Part of this case is omitted.

[44] See, also, State v. Johnson, 31 La. Ann. 368 (1879); Butler v. State, 91 Ga. 161, 16 S. E. 984 (1892); Commonwealth v. Coughlin, 182 Mass. 558, 66 N. E. 207 (1903).

STATE v. McGAHEY.

(Supreme Court of North Dakota, 1893. 3 N. D. 293, 55 N. W. 753.)

BARTHOLOMEW C. J.† * * * When counsel for the plaintiff in error asked the court to compel the prosecution to produce and swear Mrs. Hill, the prosecuting attorney, in opposing such request, and in the presence and hearing of the jury, used the following language: "Information comes to me that the witness whose presence is requested as a witness for the state has been known to be conniving and going with the defendant in endeavoring to secure testimony in any way that it can be secured as against the state, in favor of the defense, and for that reason the state declines to produce her or to swear her here as a witness for the state." Counsel for plaintiff in error immediately moved to strike out this statement as an improper statement to be made before the jury. There was no ruling on the point, and this absence of action by the court is assigned as error.

Regarding the failure to rule as equivalent to denying the motion, it follows that, if the statement was improper, the point made must be sustained. The diligence of learned counsel has been rewarded with the citation of numerous cases upon this question. The citations are all of comparative recent date, as the question is one of the refinements of the law that has but recently developed into its present proportions. That the rules announced in these cases are in the interests of fairness and justice, and that they should be implicitly enforced in all proper instances, cannot for a moment be doubted; but they should not be indiscriminately extended. Counsel must have some latitude and some discretion. In the heat of nisi prius trials, where questions are raised that must be instantly met, counsel cannot be expected to weigh with nicety and precision the effect of their words. This matter must, of necessity, rest largely in the discretion of the court, and abuse of that discretion is not to be rashly presumed.

We are in full accord with the language of the learned Supreme Court of the state of Indiana, that, "when the statement is a general one, and of a character not likely to prejudice the cause of the accused in the minds of honest men of fair intelligence, the failure of the court to check counsel should not be deemed such an abuse of discretion as to require a reversal." Combs v. State, 75 Ind. 215. And more emphatically would this be true where, as in this case, the remarks were addressed to the court, and were entirely pertinent and proper for the court to hear; and, while in the presence of the jury, yet in no sense directed to them, or intended to influence them.

No case cited by counsel would warrant us in sustaining his point.

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† Part of the opinion is omitted.

The cases will be found to fall almost without exception into one of three classes. By far the largest class are cases where counsel have violated some express statutory provision, such as referring in argument to the jury to the fact that a defendant in a criminal case failed to be sworn as a witness, or by referring on a second trial to the fact of a former conviction. In these cases a reversal is, of course, imperative. In other cases counsel have stated to the jury, as facts in counsel's own knowledge, matters prejudicial to the defendant, but immaterial to the issue on trial, and which could not be properly given in evidence; or have sought to augment the force of the evidence by their own positive but unsworn assertion of a pertinent and material matter. Another class of cases comprise the instances where counsel, in argument, have assumed certain facts to be proven, of which there was no evidence whatever. In all the cases it will be found that the objectionable language was gratuitous.

In this instance, under the condition of the authorities heretofore cited, the prosecuting attorney was entirely warranted in believing that, when opposing counsel demanded that he produce and swear as a witness for the state a party who was present at the transaction, it was imperatively necessary for him to render to the court a good and sufficient reason for not so doing. This he did in a manner by no means extravagant, and what he said could only indirectly affect the accused by impairing the credit of a witness whom he subsequently called. But we do not think its effect even went to that extent. The prosecutor was careful to state nothing as a fact. He did not give to the statement the weight of his own assertion of its truthfulness. He simply said that information had come to him of a certain character. This information was such that it would be dangerous for him to call the party, unless he knew the information to be false. We do not think the language used, in the manner, under the circumstances, and for the purpose stated, was at all "likely to prejudice the cause of the accused in the minds of honest men of fair intelligence," and hence there was no abuse of judicial discretion in refusing to strike it out, or caution the jury against it. * * *

The judgment of the trial court must be affirmed. All concur.

When they are to swear, let them swear one after another, that they will speak the truth of what shall be demanded of them on our part, so help them God and the saints. And let no falsehood be ever knowingly practised; for they cannot swear in a matter of greater moment, than in that of life and member. Afterwards let the jurors be charged of what fact they are to speak the truth. And then let them go and confer together, and be kept by a bailiff, so that no one speak to them; and if any one does so, or if there be any one among them who is not sworn, let him be committed to prison, and all the rest amerced for their folly in suffering it.[45]

Britton, bk. 1, 12.

REX v. STONE.

(Court of King's Bench, 1796. 6 Term R. 527.)

The prisoner was tried at the bar of this court on the 28th and 29th days of January, in this term, upon an indictment for high treason on two branches of 25 Edw. III, St. 5, c. 2, for compassing the death of the king, and for adhering to his enemies. * * *

The court having sat on the first day of the trial from 9 o'clock in the morning till 10 o'clock at night without any interruption or refreshment, and the Attorney General stating that his evidence would occupy four hours more, and some of the jury being very much exhausted and incapable as they declared of keeping up their attention much longer, the court adjourned till 9 o'clock the next morning; Lord Kenyon observing that necessity justified what it compelled, and that, though it was left to modern times to bring forward cases of such extraordinary length, yet no rule could compel the court to continue longer sitting than their natural powers would enable them to do the business of it. The jury retired to an adjoining tavern, where accommodations were prepared for them, and the bailiffs were sworn "well and truly to keep the jury and neither to speak to them themselves, nor suffer any other person to speak to them touching any matter relative to this trial."

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[45] After the jury has retired to consider their verdict, they should be kept together until they find a verdict, or are dismissed by the court. Maher v. State, 3 Minn. 444 (Gil. 329) (1859). And if defendant was prejudiced by a separation of the jury, a new trial will be granted. Some courts presume such prejudice from the mere fact of separation. People v. Thornton, 74 Cal. 482, 16 Pac. 244 (1888). And require affirmative evidence to the contrary to prevent a new trial. Cornwall v. State, 91 Ga. 277, 18 S. E. 154 (1892); Eastwood v. People, 3 Parker, Cr. R. (N. Y.) 25 (1855).

If the jury is kept together in the custody of the officer, it has been held that a new trial will not be granted because the jury were allowed to attend religious services at a church. State v. Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518 (1896). Or to go to a theater. Jones v. People, 6 Colo. 452, 45 Am. Rep. 526 (1882).

After being sworn and before retiring to consider their verdict, the jury may, in cases of misdemeanor, be allowed to separate. Reg. v. Kinnear, 2 B. & Ald. 462 (1819); Bowdoin v. State, 113 Ga. 1150, 39 S. E. 478 (1901). In cases of felony, the common-law rule forbade the separation of the jury. Reg. v. Hare, 3 Fost. & F. 315 (1862). And see Delmare's Case, 11 How. St. Tr. 559 (1686); Hardy's Case, 24 How. St. Tr. 416 (1794); Reg. v. Kinnear, 2 B. & Ald. 462 (1819). This rule, however, was not followed in the United States, except in capital cases. People v. Shafer, 1 Utah, 260 (1875); McCreary v. Commonwealth, 29 Pa. 323 (1857); State v. Collins, 81 Mo. 652 (1884). And not always even in capital cases. Stephens v. People, 19 N. Y. 549 (1859); State v. Belcher, 13 S. C. 459 (1880). It was abolished in England by the act of 60 & 61 Vict. c. 18 (1897), in cases other than treason, murder, and treason felony.

The entry of the adjournment was in this form:

Thursday next after fifteen days of St. Hilary in the 36th year, etc. Forasmuch as it appears to the court here from the length of time which has been already occupied by the trial of the issue joined upon this indictment and the further time which will be necessarily occupied by the same that justice cannot be done if this court proceed without intermission upon the said trial; it is ordered that the jury impanneled and sworn to try the said issue have leave to withdraw from the bar of this court, being well and truly kept by six bailiffs duly sworn not to permit any person to speak to them touching any matter relative to the trial of this issue; and that the same jury shall again come to the bar of this court on the morrow at nine o'clock in the forenoon. And it is further ordered that the prisoner be again brought to the bar of this court at that time.

By the Court. The prisoner was allowed occasionally to sit.

* * *[46]

BENNET v. THE HUNDRED OF HARTFORD.

(Upper Bench, 1650. Style, 233.)

In a Tryall at Bar between the inhabitants of Hartford and Bennet a Caryer upon an Action brought against them upon the Statute of Winchester, for a robbery committed within that Hundred upon his servant. It was said by the Court, that if either of the parties to a tryall desire that a Juror may give evidence of something of his own knowledge, to the rest of the Jurors, that the Court will examine him openly in Court upon his oath, and he ought not to be examined in private by his companions. And it was also said, that if a robbery be done in crepusculo, the Hundred shall not be charged; but if it be done by cleer day light, whether it be before Sun rise or after Sun set, it is all one, for the Hundred shall be charged on both cases.

HAREBOTTLE v. PLACOCK.

(Court of King's Bench, 1 Jac. I. Cro. Jac. 21.)

Ejectment of land, and a coal-pit in the same land. The defendant pleaded not guilty, and it was found against him. It was now moved in arrest of judgment: * * * Thirdly, because the jurors had taken meat and drink before their verdict given; which is certified upon the postea, but not examined at whose charge.

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[46] Part of this case is omitted.

THE COURT said, that would make a great difference; for if it were at the cost of the party for whom they gave their verdict, it will make the verdict void; but if it were at their own costs, it is only fineable, and the verdict good.[47]

PEOPLE v. CULLEN.

(Supreme Court of New York, General Term, First Department, 1889. 53 Hun, 629, 5 N. Y. Supp. 886.)

Indictment against Dennis J. Cullen, in three counts, charging that defendant made an assault on one Lizzie Voss, she being of the age of seven and a half years, and attempted to have sexual intercourse with her. * * * During the cross-examination of complainant, which was as to the details of the alleged attempt, one of the jurors exclaimed: "We have heard enough now." * * *

VAN BRUNT, P. J.[47] * * * As to the exclamation of the juror during the progress of the trial, it may very well have been called forth by the reiteration of the disgusting evidence of the case, and in no way indicated that the juror was in any way not impartial between the prisoner and the people.

Upon the whole case, therefore, we think that the conviction should be affirmed. All concur.

McKAHAN v. BALTIMORE & O. R. CO.

(Supreme Court of Pennsylvania, 1909. 223 Pa. 1, 72 Atl. 251.)

BROWN, J.[47] * * * But, even if the case were for a jury, the judgment would have to be reversed for the misconduct of a juror following an improper remark and a misstatement of the law by the trial judge during the argument on the motion for a nonsuit. Counsel for the defendant stated in that argument that the case was one of a railroad so constructed across a public road that there was no point where a traveler could stop, look, and listen, and, as he avers, before he could follow this with the statement that there was such a point beyond the mill siding, he was interrupted by the court with the remark that, if that were so, "the railroad ought certainly to have had somebody there to give warning." This was followed by applause from the audience in the courtroom, in which one of the jurors impaneled in the case joined by clapping his hands. A motion was promptly made by counsel for the defendant for the withdrawal of a juror and the continuance of the case until the next term, which was refused.

On the instant the court should, of its own motion, have taken notice of the misconduct of the juror and, after discharging him from further service and continuing the case, imposed a proper penalty upon him. This was due to the orderly administration of justice and to the court's own dignity. Neither the trial judge's "knowledge of the offending juryman" nor his apology can be regarded as an excuse for the court's failure to discharge its duty, and, in neglecting to do so, the case went on, in the face of defendant's protest, before at least one juror who had shown himself unfit to try it. In view of his open exhibition of feeling and his applauding concurrence in the incorrect statement of the court that it was the duty of the defendant to have had somebody at the crossing to give warning, it was the appellant's clear right to ask that he be declared disqualified to further sit in judgment between it and the plaintiff, for the case could not safely be thereafter committed to him by any admonition of the trial judge in his charge that it would have to be considered and disposed of by the jury "without any reference to that little incident" and the expression of confidence by the court that the offending juror would so dispose of it.

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[47] Part of this case is omitted.

The impression made upon the mind of the juror by the remark of the judge was manifestly against the defendant, and not likely to be changed by anything submitted by it in its defense. Those of us who have had experience in jury trials know that impressions once made are not easily erased, in spite of all the caution jurors may receive from the court. Shaeffer v. Kreitzer, 6 Bin. 430. "It is one thing to prevent the entry of an influence into the mind, and quite another to dislodge it. As well might one attempt to brush off with the hand a stain of ink from a piece of white linen. One in the very nature of things is just as impossible as the other." Orlady, J., in Fisher v. Pennsylvania Co., 34 Pa. Super. Ct. 500.

Judgment reversed.[50]

COMMONWEALTH v. JONGRASS.

(Supreme Court of Pennsylvania, 1897. 181 Pa. 172, 37 Atl. 207.)

PER CURIAM. There is no code of professional ethics that is peculiar to the criminal courts. There are no methods of practice to be tolerated there that are not equally entitled to recognition in the civil courts. Subtle distinctions that mark no substantial differences, and that do not affect the merits of a controversy, unless it may be to obscure or to defeat them, should not be allowed to thwart justice, in the interests of disorder and crime. The assignments of error in this case raise two questions of this class. They touch no important right of a defendant.

The first one relates to the validity of the oath administered by the interpreter to some of the witnesses. The form of the oath is not questioned, nor is it denied that the interpreter correctly translated it into the language of the witness. It was done in the presence and under the immediate direction of the court. Under such circumstances, if it had been administered by a bystander it would have bound the conscience of the witness, both in law and in morals, as a valid oath. It was not necessary that the clerk should repeat the oath to the interpreter every time he was called upon to administer it to a witness. It was enough if this was done at the beginning of the examination. The interpreter acts under the sanction of his oath as such, when he administers the oath to the witness, no less than when he interprets the testimony of the witness to the court and jury.

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[50] See, also, Smalls v. State, 102 Ga. 31, 29 S. E. 153 (1897).

The other question relates to the refusal of the court below to set aside the verdict because it was alleged that one of the jurors had, for an instant, appeared to be asleep. This motion was addressed to the discretion of the court. It depended upon a fact that must have transpired in the presence of the learned judge. If this assignment was regular, we could not consider it upon this record. The learned judge stated, when this motion was before him, that he had given particular attention to this juryman during the trial, because of his age, and was able to say upon his own knowledge that he was awake and attentive except for a single instant, and that he lost nothing of the trial. It was idle to call witnesses to prove what the learned judge knew to be untrue. He would not have been bound by such testimony, if given, for neither a judge nor a juror is bound to accept the statement of a witness that contradicts the testimony of his own senses. The evidence abundantly justified the conviction.

The assignments of error are overruled, the judgment affirmed, and the record remitted for purposes of execution.[51]

CHEEK v. STATE.

(Supreme Court of Indiana, 1871. 35 Ind. 492.)

PETTIT, J.[52] The appellant was indicted for murder in the first degree, for killing one Thomas Harrison, in the Dearborn circuit court.

* * *

Two of the jurors, over the objection of the defendant, and after the court had told them they must not do so, persisted in writing down notes of the evidence. This disobedience of the order of the court was a gross violation of, and contempt for, the authority of the court, and was misconduct for which the jurors might have been severely punished, and of itself would entitle the defendant to a new trial. It was well calculated to divert the attention of the jurors, while they were busy, pencil or pen in hand, from the evidence, as it would naturally be progressing while such notes were being made. The juror is to register the evidence, as it is given, on the tablets of his memory, and not otherwise. Then the faculty of the memory is made, so far as the jury is concerned, the sole depository of all the evidence that may be given; unless a different course be consented to by the parties, or the court. Burrill, Cir. Ev. (2d. Ed.) 108, and note. The jury should not be allowed to take the evidence with them to their room, except in their memory. It can make no difference whether the notes are written by a juror or by some one else. Jurors would be too apt to rely on what might be imperfectly written, and thus make the case turn on a part only of the facts. * * *

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[51] See, also, McClary v. State, 75 Ind. 260 (1881).

[52] Part of this case is omitted.

The judgment is reversed, with instructions to the court below to give the appellant a new trial.[53]

PEOPLE v. McCURDY.

(Supreme Court of California, 1886. 68 Cal. 576, 10 Pac. 207.)

Searls, C.[54] The defendant was accused by information of the murder of one Charles W. Dreher, in the county of Lake, on the 14th day of July, 1884, and as the result of a trial was convicted of murder in the first degree, and sentenced to suffer the extreme penalty of the law. The appeal is from an order denying a motion for a new trial, and from an order denying a motion in arrest of judgment. * * *

It is objected that J. A. Tennison, one of the jurors, acted in an improper manner. So far as the record shows, the county clerk and one of the counsel for the prosecution, during the progress of the trial, were engaged in conversation in reference to the case when the juror Tennison joined them, whereupon the county clerk very properly called attention to the fact that Tennison was a juror, and said they must not talk, as "Lane is one of the jurors," to which Tennison replied to the effect that "they might go ahead; it wouldn't make any difference to him." The remark seems to have been a correct one, and in it we fail to see any sufficient evidence of a disposition to act improperly in the case. * * *

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[53] Compare, Thomas v. State, 90 Ga. 437, 16 S. E. 94 (1892).

"There is no doubt, however, that the reading of newspapers by jurors while engaged in the trial of a cause is an inattention to duty, which ought to be promptly corrected, and if the newspaper contains any matter in connection with the subject-matter of the trial, which would be at all likely to influence jurors in the performance of duty, the act will constitute grounds for a motion for a new trial. * * * If it be proved as a fact, or may be presumed as a conclusion of law, that the verdict may have been influenced by information or impressions received from sources outside of the evidence in the case, such a verdict is subject to be set aside." McKee, J., in People v. McCoy, 71 Cal. 397, 12 Pac. 273 (1886).

See, also, People v. Gaffney, 14 Abb. Prac. N. S. (N. Y.) 36 (1872).

[54] Part of this case is omitted.

Our examination has failed to develop any sufficient cause to warrant a reversal, and we are of opinion the orders overruling the motions for a new trial and in arrest of judgment should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the orders are affirmed.[55]

PEOPLE v. FLACK.

(Supreme Court of New York, General Term, First Department. 1890. 57 Hun, 83, 10 N. Y. Supp. 475.)

VAN BRUNT, P. J.[56] * * * The only other exception which appears upon the counsel's brief is one which is not argued at length, and it is to the effect that the court erred in denying a motion for a new trial based upon the intrusion of a World reporter into the jury-room during their deliberations. It appearing in the record of this case, from the affidavits of the jurors, that their judgment was in no manner affected by reason of the intrusion of this man, without their knowledge, into the jury room, it is evident that the defendants have sustained no damage, and consequently the verdict cannot be set aside upon that ground. But it is also clear that, whatever rights the defendants may have had by reason of the happening of this incident, they were waived by the subsequent conduct of the defendants and their counsel. After they had full knowledge of the facts, they permitted the trial to go on, and the jury to be sent back without objection, and asked the court to give instructions to the jury on their behalf, the refusal to give some of which forms one of the grounds upon which this appeal is founded. Under such circumstances the defendants cannot now be heard to claim immunity because of this alleged irregularity. They had their opportunity to object to the sending back of this jury. They did not, and they cannot now be allowed to assume the position of speculating upon the verdict of the jury. If it was in their favor, they would be discharged; if against them, it would be set aside. * * *

There do not appear to be any errors which would justify a reversal of the judgment, and it should be affirmed. All concur.[57]

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[55] See, also, State v. Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518 (1896); People v. Brannigan, 21 Cal. 337 (1863); Cahoon v. State, 20 Ga. 752 (1856).

"If the jury were really subjected for hours to the influence of an excited crowd of men who discussed the merits of the controversy and demanded the guilt of the prisoner in their hearing, the integrity and purity of the trial would of course be impeached, and a new trial, freed from all bias and undue influence, would be the least reparation that the law could make in behalf of justice." Cockrill, C. J., in Vaughan v. State, 57 Ark. 8, 20 S. W. 588 (1892).

[56] Part of this case is omitted.

[57] See, also, Goerson v. Commonwealth, 106 Pa. 477, 51 Am. Rep. 534 (1884); State v. Cartright, 20 W. Va. 32 (1882).

PEOPLE v. LINZEY.

(Supreme Court of New York, General Term, Fifth Department, 1894. 79 Hun, 23, 29 N. Y. Supp. 560.)

HAIGHT, J.[58] The defendant was convicted of the offense of stealing a $20 bill from the money drawer in the coal office owned by John Hamlin at East Broomfield Station, in the county of Ontario. * * *

The defendant's counsel, in his affidavit to procure an allowance of an appeal from the judgment of the court of special sessions, among other things states that: "He has been informed by the said justice and one of the jurors who tried said case that, after the jury retired to consider their verdict, said justice went to said jury room, and read to said jury the information upon which the warrant was issued in said case, and that that was done without the knowledge or consent of the defendant or his attorney, nor was either of them present when said statements were so read as aforesaid."

The justice in his return says nothing in reference to this charge, but he attaches thereto his affidavit, in which he states: "That he entered the jury room, while they were deliberating upon the case, at the request of the officer in charge, supposing that a verdict had been agreed upon; that upon learning, immediately after entering, that no agreement had been reached, deponent told the jurymen he had no right to be there without the attorney, and turned to leave the room, when one of the jurymen said that they wanted to know with what crime the defendant was charged; to which deponent replied, after opening the information, but not reading therefrom, 'Petit larceny;' that no other conversation was had by deponent while in the jury room, and no information or evidence was read to them."

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[58] Part of this case is omitted.

"The common-law rule in criminal cases was that the jury, when they retired to deliberate on their verdict, should take with them such books and papers which had been produced in evidence as the judge presiding should direct. * * * Whether a writing introduced in evidence in a criminal case should be delivered to the jury, to be consulted by them in the jury room, rests in the sound discretion and judgment of the court, and it is therefore not error to permit a jury to take a written statement, unless the reviewing court can say that such course was prejudicial to the defendant." Boggs, J., in Dunn v. People, 172 Ill. 588, 50 N. E. 138 (1898).

"Another contention of the defendant is that during the trial one of the jurors had a copy of the Penal Code and Code of Criminal Procedure, which he read and exhibited to some of his fellows. * * * We are of opinion that while reading the Code by the jurors may be regarded as irregular, and as misconduct on their part, yet, as there is no proof that it in any way affected the result, or was prejudicial to the defendant, the court below was justified in denying his application for a new trial, so far as it was based on that ground." Martin, J., in People v. Priori, 164 N. Y. 470, 58 N. E. 672 (1900).

See, also, People v. Draper, 28 Hun (N. Y.) 1 (1882). Cf. Mitchell v. Carter, 14 Hun (N. Y.) 448 (1878).

As to the burden of proof to establish the effect of misbehavior, and the evidence admissible to establish it, see State v. Cartright, 20 W. Va. 32 (1882); Vaughan v. State, 57 Ark. 1, 20 S. W. 588 (1892); Riley v. State, 9 Humph. (Tenn.) 646 (1849).

The practice is that where an appeal is founded upon an error in fact not appearing upon the record, and not within the knowledge of the justice, the court may determine the matter upon affidavit; but the error here charged was within the knowledge of the justice, for it has reference to his own conduct pending the deliberation of the jury, and the facts in reference thereto should have been incorporated in his return. Vallen v. McGuire, 49 Hun, 594, 2 N. Y. Supp. 381. But, we think, in this case we may treat his affidavit attached to the return as a part thereof and determine the question upon the facts presented. In Sargent v. Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185, the foreman of the jury wrote to the judge that they could not agree, and that they waited for his directions. The judge answered in writing, saying that he was unwilling, after so much time had been consumed in the case, to permit them to separate, and gave some directions that would enable them to consider the case in a more systematic manner, and added that the officer had directions to take them to a more convenient apartment, if they desired. On review, the judgment was reversed, and a new trial granted.

Parker, C. J., in delivering the opinion of the court, says: "It is impossible, we think, to complain of the substance of the communication. The only question is whether any communication at all is proper, and, if it was not, the party against whom the verdict was is entitled to a new trial, and we are all of the opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and the jury after the cause has been committed to them by the charge of the judge, unless in open court, and, where practicable, in the presence of the counsel in the case. The oath administered to the officer seems to indicate this as the proper course. He is to suffer no person to speak to them nor to speak to them himself, unless to ask them whether they are agreed, and he is not to suffer them to separate until they are agreed, unless by the order of the court. When the court has adjourned, the judge carries no power with him to his lodging, and has no more authority over the jury than any other person, and any direction to them from him, either verbally or in writing, is improper. It is not sufficient to say that the power is in the hands highly responsible for a proper exercise of it. The only sure way to prevent all jealousies and suspicions is to consider the judge as having no control whatever over the case except in open court, in the presence of the parties and their counsel. The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice, and the convenience of jurors is of small consequence when compared to this great object."

In Bunn v. Croul, 10 Johns. 239, while the jury were deliberating on their verdict, the justice was requested to inform them whether a particular point of evidence had been given, stating it to him. The justice informed the jury that it had, and mentioned the name of the witness who had testified to the fact. A verdict was found for the plaintiff, on which the justice gave judgment. On review, the judgment was reversed, the court saying: "It cannot fairly be inferred from the return that the explanation given by the justice to the jury after they had retired to make up their verdict was by the consent or in the presence of the parties. If it was not, the allowance of such a practice would be dangerous to the rights of parties. The justice's recollection might not be accurate as to what the witness had said, and for that reason the testimony might be misstated, when, if the parties were present, or the witnesses again called to repeat their testimony, any mistake might be corrected."

In Taylor v. Betsford, 13 Johns. 487, the justice went into the jury room, at the request of the jury, to answer certain questions proposed to him, and the judgment was reversed, the court saying: "The only error necessary to be noticed in this case is that the justice went into the room with the jury at their request, privately and apart from the parties, to answer certain questions proposed to him by the jury. This we have repeatedly held to be erroneous, unless done with the consent of the parties. Whether the information given by the justice was material, or had any influence upon the verdict of the jury, is a matter which we will not inquire into."

In Loan Co. v. Mix, 51 N. Y. 558, it was held that a party to an action on trial by a jury is entitled to have all the proceedings public, both in respect to the production of proof and to the instructions to the jury by the court, and there ought to be no communication between the judge and the jury after the latter have gone from the bar to consider their verdict; that this right is a substantial one, and is not in the discretion of the court; and a party moving for a new trial upon this ground is not bound to show affirmatively that such communication tended to his injury.

So much for the authorities bearing upon the question. As we have seen, the justice is charged with having read to the jury the information upon which the warrant was issued. The appellant's attorney states that he was so informed by the justice and one of the jurymen. The information consisted of the ex parte affidavits taken before the justice. It was certainly improper, and might well have tended to prejudice the jury. The justice admits in his affidavit that he opened the information, but states that he did not read therefrom; that then he answered that the charge was petit larceny.

As has been stated in the cases, his recollection might not be accurate as to what he did before the jury. It leaves an opportunity for a defeated party to suspect that an injustice has been done him, and, in the language of one of the learned judges to which we have referred: "The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice."

Undoubtedly, treating the affidavit of the justice as a part of his return, we are bound by his statement as to the facts, but, as we have already seen, it is not incumbent upon the appellant to show that he has been prejudiced in order to entitle him to a new trial. The judgment of the Court of Special Sessions and of the Court of Sessions of Ontario county appealed from should be reversed, and a new trial granted in the Court of Sessions of that county, and for that purpose the proceedings should be remitted to that court. All concur.

SECTION 6.—RESPECTIVE PROVINCES OF COURT AND JURY

BEARD v. STATE.

(Court of Appeals of Maryland, 1889. 71 Md. 275, 17 Atl. 1044, 4 L. R. A. 675, 17 Am. St. Rep. 536.)

ALVEY, C. J.[59] The traverser in this case was indicted for keeping a disorderly house, and, upon trial by a jury, was convicted of the offense. * * *

We come now to the third exception, and the questions presented by that exception are whether it would be competent to the judge presiding at the trial of a criminal case to give an advisory instruction to the jury, when requested so to do, and, if it be competent so to instruct, whether the instruction given in this case was correct or not. These questions have been argued by counsel with much zeal and ability, and doubtless they are of great importance in the correct and faithful administration of the criminal law of the state.

It appears that, after the case had been fully argued to the jury by counsel, the jury retired to consider of their verdict, and, after being out many hours, they were brought into court and questioned as to whether they had agreed. They stated, through their foreman, that they had not agreed upon a verdict, and there was no likelihood of their being able to agree. Whereupon one of the jurors suggested that he thought it probable that a verdict could be had, if the jury were instructed as to the law governing the case. To this the judge replied that he would instruct the jury, if they unanimously requested him to do so; and directed the foreman to ascertain whether it was the wish of all the jurors that they should be instructed. The foreman, after consulting the panel, announced that the jury were unanimous in their desire to be instructed as to the law. But the counsel for the traverser objected, and earnestly protested against such instruction being given, and insisted that the jury were the exclusive judges of the law as well as of the fact in criminal cases, and therefore the court ought not to interfere.

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[59] Part of this case is omitted.

"The Constitution gives to juries in criminal cases the right to determine the law as well as the facts. It does not, however, give them the right to disregard the law. To aid them in correctly determining the law, it is made the duty of the court to instruct them. They have no more right in determining the law, to disregard and ignore the court's instructions arbitrarily and without cause than to disregard and ignore the evidence, and determine the facts arbitrarily and without cause." McBride, J., in Blaker v. State, 130 Ind. 204, 29 N. E. 1078 (1891).

However, the court, notwithstanding the protest of the counsel, reduced to writing and read to the jury the following instruction: "If you find from the evidence that the traverser kept a bar-room and dance-hall, with music, for the purpose and with the intent of bringing together and entertaining prostitutes, and men desirous of their company, and that such persons habitually assembled there to drink and dance together, then you may find said establishment a disorderly house, within the meaning of the indictment, even although you may also believe that the house was quietly kept, and no conspicuous improprieties were permitted inside. The jury being the judges of the law as well as fact, this charge is to be understood as advisory only of what the law is."

In the first place, it is argued that the judge had no right to give the instruction against the protest of the traverser; and, in the second place, that the instruction was erroneous in principle, and not within the terms of the indictment, and therefore misleading in its effect upon the jury.

1. The Constitution of the state (article 15, § 5) is very explicit in declaring that "in the trial of all criminal cases the jury shall be the judges of law as well as of fact." But it has been held by our predecessors that this provision of the Constitution is merely declaratory, and did not alter the pre-existing law regulating the powers of the court and jury in the trial of criminal cases. Franklin v. State, 12 Md. 236. Both before and since the constitutional declaration upon the subject, it was and has been the practice of judges in some parts of the state to decline to give instructions to the jury in criminal cases under any circumstances, while in other parts of the state it has been the practice for the judges to give advisory instructions, when requested so to do. It seems to have been regarded as entirely a matter of discretion with the judge, there being no positive duty requiring him to pursue the one course or the other. Whenever, however, the judge has thought it proper to instruct, it has always been deemed necessary that he should be careful to put the instruction in an advisory form, so that the jury be left entirely free to find their verdict in accordance with their own judgment of the law as well as the facts. The instruction, when given, goes to the jury simply as a means of enlightenment, and not as a binding and positive rule for their government, as it does in civil cases.

The judge, therefore, cannot, by any instruction given in a criminal case, bind the jury as to the definition of the crime, or as to the legal effect of the evidence before them. He can only bind and conclude the jury as to what evidence shall be considered by them, he being the exclusive judge of what facts or circumstances are admissible for consideration. The practice of instructing the jury, within the limitations and under the restrictions just stated, has received the sanction of this court upon more than one occasion, and such practice must now be regarded as fully authorized. Wheeler v. State, 42 Md. 563, 569; Broll v. State, 45 Md. 356; Bloomer v. State, 48 Md. 521, 538; Forwood v. State, 49 Md. 537; Swann v. State, 64 Md. 425, 1 Atl. 872.

And such practice is founded in the soundest practical reason and good sense; for though the juries are made judges of the law, they are unlearned, and are not infrequently composed, in part, at least, of persons wholly uninstructed as to the laws under which they live. When sworn upon the panel, it becomes their duty to decide the case according to the established rules of law of the state, and not according to any capricious rules of their own; and it must be supposed that they are always desirous of performing their duty, and making their verdicts conform to law. To enable them to accomplish that object, no proper light should be withheld from them. In the argument of the case before them by counsel, text-books, no matter of what authority, or whether of any authority at all, reported decisions of all grades of courts, from the highest to the lowest, and no matter where made, are read to the jury, with the glossary of counsel, to enforce certain theories; and the jury are required to discriminate and decide, upon the authorities cited, as to what is the law in their own state which they are sworn to administer.

In such state of doubt and perplexity, is it not reasonable and proper that they should have the advisory aid of the judge who is supposed to know what the law of the state really is, and who has the ultimate power of revising and setting aside their verdict, if they should mistake and misapply the law to the injury of the accused? It would seem that there could be no room for a diversity of opinion upon this question, and no case could more fully illustrate the propriety of the practice than the present. If the instruction given be erroneous, though in a mere advisory form, it may be made the subject of an exception, to be corrected on appeal. Swann v. State, supra. * * *

Finding no error in the rulings of the court below, those rulings will be affirmed, and the cause remanded.

COMMONWEALTH v. McMANUS.

(Supreme Court of Pennsylvania, 1891. 143 Pa. 64, 21 Atl. 1018, 22 Atl. 761.)

MITCHELL, J.[60] I concur in affirming this judgment, and in the reasons given; but upon one point I would go further, and put an end, once for all, to a doctrine that I regard as unsound in every point of view—historical, logical, or technical. The prisoner at the trial requested the judge to charge the jury that they were "judges of the law as well as of the facts." The learned judge, feeling himself bound by the language of Kane v. Com., 89 Pa. 522, 33 Am. Rep. 787 answered that the jury had been sworn to decide the case on the law and the evidence; that the statement of the law by the court was the best evidence of the law within the jury's reach; and that therefore, in view of that evidence, and viewing it as evidence only, the jury was to be guided by what the court had said with reference to the law.

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[60] Part of this case is omitted.

The point should, in my opinion, have been answered with an unqualified negative. The jury are not judges of the law in any case, civil or criminal. Neither at common law nor under the Constitution of Pennsylvania is the determination of the law any part of their duty or their right. The notion is of modern growth, and arises undoubtedly from a perversion of the history and results of the celebrated contest over the right to return a general verdict, especially in cases of libel, which ended in Fox's Bill, 32 Geo. III, c. 60. In the early days of jury trials, issues that went to the country were usually simple, and were probably submitted to the jury without much separation of law and fact by the judge, and in that sense juries decided the law. But the distinction between questions of law and fact, and the tribunals for their decision, respectively, lies at the foundation of our juridical system, and there was no time when it did not exist.

The rule, "ad questionem facti non respondent judices, ad questionem juris non respondent juratores," was an ancient maxim in the days of Coke (Co. Litt. 155a; Altham's Case, 8 Coke, 155a; Dowman's Case, 9 Coke, 13a); and Mr. Bigelow, treating of the class of cases raising questions of law or some question of fact properly belonging to the court to decide, quotes the case of Archbishop of Canterbury v. Abbot of Battle Abbey, 1 Rotul. 143, temp. Steph., which "turned upon a question of law, and was decided (without appointment of a trial term) just as a modern case of the kind would be decided, by a submission of the point of law in the question to the determination of the court, and not to some test imposed by the parties." History of Procedure in England during the Norman Period, by M. M. Bigelow, p. 286.

Nor was there any distinction, in respect to the merely incidental way in which juries passed upon matters of law, between civil and criminal cases. They might return a general or a special verdict in either, but they early sought to escape the obligation of giving a general verdict, because it subjected them to the risk of an attaint; and Coke says: "Some justices did rule over the recognitors to give a precise or direct verdict, without finding the special matter." 2 Inst. 422. To relieve juries from the burden the statute of Westminster II, c. 30, enacted, "Quod justiciarii ad assisas capiendo assignati, non compellant juratores dicere præcise si sit disseisina vel non, dummodo dicere voluncrint veritatem facti et petere auxilium justic;" and, commenting upon this section, Coke says: "In the end it hath been resolved that in all actions, real, personal, and mixed, and upon all issues joined, general or special, the jury might find the matter of fact pertinent, * * * and thereupon pray the discretion of the court for the law; and this the jurors might do at the common law, not only in cases between party and party whereof this act putteth an example of the assise, but also in pleas of the crown." 2 Inst. 425.

It is a striking illustration of the uniformity of human motives at all periods, that, while the attaint remained as a remedy for perversity or favoritism, the struggle of juries was to escape the obligation of general verdicts, and to maintain the right of special findings of fact; but, when the decline and final disuse of the attaint rendered them practically irresponsible, the struggle was reversed, and juries asserted stoutly the right to give general verdicts, while the tendency of lawyers and judges was to confine them to special findings of fact, and to have the court pronounce the result as a matter of law. The period of transition was long, and changes slow. It was clearly and justly felt that juries as judges of the law, in any but an incidental way, were an anomaly in the system, and perhaps those who endeavored to do away with it claimed too much. Safety was thought to reside in the retention by juries of the right to give general verdicts. In view of the constant and notorious failure of justice in certain classes of cases, by the occasional perversity and the frequent cowardice of juries, it may be doubted whether it would not have produced better results to have enlarged the power of judges to compel special verdicts.

But, however this may be, the right of juries to give general verdicts, especially in criminal cases, has been maintained, and the last contest made on it was in regard to libel. The exact line between law and fact, not always easy to draw, presented in the case of libel some special difficulties, technical and other. The alleged libel being in writing, its terms were not in dispute, and naturally fell to the court to pass upon, as other writings did; and the intent, libelous or otherwise, being claimed as a legal inference, there was nothing left in dispute but the fact of publication and the truth of the innuendo. Accordingly the juries in Dean of St. Asaph's Case, 3 Term R. 428, note, and King v. Withers, Id., were confined to these two points; and it was to counteract these rulings of Buller and Mansfield and Kenyon, (though it cannot be disputed that they were in accordance with long-settled practice,) and to secure, in libel as in other cases, the right of the jury to find a general verdict upon the whole matter in issue, that the act of 32 Geo. III, c. 60, was passed.

The text of that famous statute is worth quoting to show how little foundation it affords for the superstructure that is sought to be built upon it. It is entitled "An act to remove doubts respecting the functions of juries in cases of libel," and its language is: "Whereas, doubts have arisen whether on the trial of an indictment * * * for the making or publishing any libel, where an issue is joined * * * on the plea of not guilty pleaded, it be competent to the jury impaneled to try the same to give their verdict upon the whole matter in issue, be it therefore declared * * * that, on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the court or judge before whom such indictment or information shall be tried to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information: Provided, always, that, on every such trial, the court or judge before whom such indictment or information shall be tried shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases: Provided, also, that nothing herein contained shall extend, or be construed to extend, to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases: Provided, also, that in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this act, anything herein contained to the contrary notwithstanding."

Nothing could be clearer than the care with which this act was directed to the exact point in controversy, the right to render a general verdict of guilty or not guilty upon the whole issue in case of libel and the equal care with which the right of the court to pass finally upon the questions of law was preserved by the provisos that the judge should give the jury his "opinion and directions," and that a verdict should still not be conclusive of the law against a defendant, but he should have his right to an arrest of judgment, as theretofore enjoyed. The claim that juries were to be judges of the law was thus intentionally and carefully excluded.

The Constitution of Pennsylvania was made in 1790, two years before Fox's libel act. The controversy was then at its height, and the subject commanded popular attention. In fact, Pennsylvania had borne rather a distinguished part in the discussion, and the speech of Andrew Hamilton in the trial of John Peter Zenger was regarded as the vindication of popular rights, and not only quoted as such by Erskine, but referred to, among other authorities, by Hargrave. Co. Litt. 155b. "No lawyer," says Mr. Binney, "can read that argument without perceiving that while it was a spirited and vigorous, though rather overbearing, harangue, which carried the jury away from the instruction of the court, and from the established law of both the colony and the mother country, he argued elaborately what was not law anywhere with the same confidence as he did the better points of his case. It is, however, worth remembering, and to his honor, that he was half a century before Mr. Erskine, and the declaratory act of Mr. Fox, in asserting the right of the jury to give a general verdict in libel as much as in murder." Leaders of the Old Bar of Philadelphia, p. 15.

The members of our convention of 1790 were familiar with the subject, and the minutes show that much care was given to framing the clause in the declaration of rights which refers to it. Section 7 of article 9, relating to liberty of the press, was originally reported to the convention by the committee to draft a proposed constitution, on December 21, 1789, in the following form: "That the printing presses shall be free to every person who undertakes to examine the proceeding of the Legislature, or any branch of government, and no law shall ever be made restraining the right thereof. The free communication of thoughts and opinions is one of the most invaluable rights of men, and every citizen may freely speak, write, and print, being responsible for the abuse of that liberty." Proceedings of Convention, p. 162 (Harrisburg, 1825). This was reported from committee of the whole on February 5, 1790, in the same form (dropping only the word "most" before the word "invaluable"), but with the addition: "But upon indictments for the publication of papers investigating the conduct of individuals in their public capacity, or of those applying or canvassing for office, the truth of the facts may be given in evidence in justification upon the general issue." Id. 174. On February 22d, this section being under consideration, Mr. Addison offered as a substitute for the sentence last quoted: "In prosecutions for libels, their truth or design may be given in evidence on the general issue, and their nature and tendency, whether proper for public information or only for private ridicule or malice, be determined by the jury." To this an amendment offered by Mr. McKean to add, "under the directions of the court, as in other cases," was adopted almost unanimously, the vote being 56 to 3; but the substitute itself received a bare majority, 32 to 27, the strong minority being in favor of restricting the truth as a justification to cases of publications upon the conduct of persons in their public capacity or of candidates for office. Id. 220–222. The convention, having ordered the proposed Constitution to be published for the consideration of the citizens, adjourned on February 26th to the following August.

On reconvening, the instrument was again taken up for discussion, section by section, and the minority made strenuous further efforts to restrict the justification to cases of public officers, at one time failing only by the close vote of 30 to 32. During the progress of the debate, an amendment offered by Mr. Lewis, and seconded by Mr. McKean, that "the jury shall have the same right to determine the law and the fact, under the direction of the court, as in other cases," was carried, and the clause finally adopted in the form: "In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is necessary or proper for public information, the truth thereof may be given in evidence; and, in all indictments for libels, the jury shall have a right to determine the law and the facts, under the directions of the court, as in other cases." Id. 274, 279.

It is impossible to read these various steps in the formulation of our fundamental law without seeing that there was never at any time the intention to make or to consider juries as in any sense judges of the law. No such possible construction seems to have been apprehended until suggested by McKean, and the practically unanimous vote on his motion to add, "under the direction of the court, as in other cases," shows the feeling of the convention on this subject. McKean was at that time one of the foremost personages of the commonwealth, perhaps its best-trained lawyer. He had studied in the Temple, and was familiar with the details of the legal controversy between Buller and Mansfield on the one side, and Erskine on the other, before Fox took it up as a matter of politics; and he knew, as Lewis and Wilson and Ross and Sitgreaves and Addison and Findley and other leaders of the convention knew, that the contest was not for any control by the jury as judges of the law—even Junius hardly ventured to put his denunciations of Mansfield in that form—but for the right of applying the law to the facts, and pronouncing the result by a general verdict. And such was the understanding of the convention, as it was of Parliament two years later, and such the natural meaning of the language on which they finally settled to express their purpose.

It puts beyond question the right to return a general verdict, nothing more. To cut the sentence in two, and say the jury are "to determine the law," is not only to pervert the meaning, but to nullify the other command, that they are to determine "under the direction of the court." What they are to determine is "the law and the facts as in other cases;" that is, the law as given to them by the court, and the facts as shown by the evidence. They are bound to take the law from the court, but, so taking it, they have the right to apply it to the facts as they may find them to be proved, and to announce the result of the whole by a general verdict of guilty or not guilty. Any other construction would be totally at variance with the fundamental principles of our system of jurisprudence, and with our settled and uncontested practice. It has never been claimed that the jury are to determine what evidence is admissible or what witness competent, yet, if they are judges of the law, they should decide these often most important law points in a case. So as to the sufficiency of an indictment. Again, the jury have a right to return a special verdict, even in a criminal case. Dowman's Case, 9 Coke, 12b; 2 Inst. 425; Hargrave's note to Co. Litt. 155b.

It is admitted that they must decide the facts, and, if they are judges of the law, then it is their duty to decide it, and they cannot transfer that duty to the court. The prisoner might demand his right that they should exercise their full functions. But all the authorities are to the contrary, and, if the finding of facts can be separated from the conclusion of law, the latter will be decided by the judges by their own views. "When a jury find the matter committed to their charge at large, and further conclude against law, the verdict is good, and the conclusion ill." Heydon's Case, 4 Coke, 42b. "The office of twelve men is no other than to inquire of matters of fact, and not to adjudge what the law is, for that is the office of the court, and not of the jury; and if they find the matter of fact at large, and further say that thereupon the law is so, where in truth the law is not so, the judges shall adjudge according to the matter of fact, and not according to the conclusion of the jury." Townsend's Case, 1 Plowd. 114b. And see 2 Hale, P. C. 302; 1 Chit. Crim. Law, 645.

Much misunderstanding has, in my judgment, been caused in this state by the case of Kane v. Com., 89 Pa. 522, 33 Am. Rep. 787. In that case the point was put to the court below that "the jury are the judges of the law and the fact," and all that this court decided was that the point should have been affirmed. The language of Chief Justice Sharswood was, however, less guarded than was usual with that eminent jurist; and, following State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90, he dismisses the perfectly clear and substantial distinction between "power" and "right" with a brevity that is scarcely consistent with the weight of the subject. "The distinction between 'power' and 'right,'" he says, "whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right. No court should give a binding instruction to a jury which they are powerless to enforce by granting a new trial if it should be disregarded."

It is somewhat remarkable that the Chief Justice should assume, as is so commonly done by counsel, that the jury will construe the law more favorably for the prisoner than the court would. It is only such a construction, too favorable to the prisoner, that the court is powerless to remedy by a new trial; and that lack of power arises, not because the jury's legal power is the same as a legal right, but because, for reasons of general policy, one verdict of acquittal is a final and irreversible termination of the case. If legal power means legal right, then a jury has a right to acquit any prisoner without regard to either law or evidence; for their power to do so is beyond question, and they cannot be held to any accountability, though they follow the maxim of lynch law—that the murdered man deserved to die anyhow, and therefore his murderer should not be punished, even though he no longer seeks refuge behind the thin veil of transitory insanity that began when the shot was fired, and ended when it had killed its man.

Whether the distinction between power and right be shadowy and unsubstantial in practice or not, it is clear and vital, and I must repudiate such a confusion of logical as well as moral ideas. A jury may disregard the evidence, but no judge has ever said it had the legal right to do so, and, if the disregard is of the weight of the evidence favorable to the prisoner, the court sets aside the verdict without hesitation; and even this court, though it does not pass upon the weight of evidence, does examine its sufficiency, and may on that ground reverse without a new venire. Com. v. Fleming, 130 Pa. 163, 18 Atl. 622, 5 L. R. A. 470, 17 Am. St. Rep. 763; Com. v. Knarr, 135 Pa. 47, 19 Atl. 805; Com. v. Railroad Co., 135 Pa. 256, 19 Atl. 1051; Com. v. Brown, 138 Pa. 452, 21 Atl. 17; Com. v. Ruddle, 142 Pa. 144, 21 Atl. 814—are a few recent instances of the exercise of this power.

So the jury may disregard the law favorable to the prisoner. As was suggested by the learned judge at the trial of the case in hand, the jury had the legal power to find murder of the first degree, without regard to the element of premeditation; but no judge would contend that they had the legal right to do so, and, if the evidence of premeditation was below the legal standard determined by the court as matter of law, not only would the trial court set aside the verdict, but this court would be bound to review the evidence, and determine if the legal elements of murder of the first degree existed in the case. Such powers and such duties in the courts are absolutely inconsistent with the right of the jury to be in any sense judges of the law.

This is not new doctrine, but the long-established law of the state. Alexander Addison was one of the staunchest asserters of the rights of juries in the constitutional convention, and was one of the minority of three who voted against McKean's amendment to insert the words, "under the direction of the court, as in other cases;" but when, three years later, he presided in the oyer and terminer of Washington county, he laid down the law in these precise and forcible terms: "Whether the facts are so or so, it lies with you to determine, according as you believe the testimony. Supposing them so or so, whether they amount to murder or manslaughter is a question of law for the court to determine. You may find according as you believe or disbelieve the facts; and, comparing the facts with the rules of law, that the prisoner is guilty or not guilty [of murder], or guilty of manslaughter, or you may find the facts specially, without drawing any conclusion of guilt or innocence, leaving it to the court to pronounce the construction which the law puts on the facts found; but you cannot, but at the peril of violation of duty, believing the facts, say that they are not what the law declares them to be, for this would be taking upon you to make the law, which is the province of the legislature, or to construe the law, which is the province of the court." Pennsylvania v. Bell, Add. 160, 1 Am. Dec. 298.

And in Sherry's Case, an indictment for murder growing out of the riots of 1844, removed by certiorari from the quarter sessions of Philadelphia, and tried in the nisi prius in April, 1845, Justice Rogers charged the jury as follows: "You are, it is true, judges, in a criminal case, in one sense, of both law and fact; for your verdict, as in civil cases, must pass on law and fact together. If you acquit, you interpose a final bar to a second prosecution. * * * The popular impression is that this power * * * arises from a right on the jury's part to decide the law, as well as the facts, according to their own sense of right. But it arises from no such thing. It rests upon a fundamental principle of the common law that no man can twice be put in jeopardy for the same offense. * * * It is important for you to keep this distinction in mind, remembering that, while you have the physical power by an acquittal to discharge a defendant from further prosecution, you have no moral power to do so against the law laid down by the court. The sanctity of your conclusions in case of an acquittal arises, not from any inherent dominion on your part over the law, but from the principle that no man shall be twice put in jeopardy for the same offense—a principle that attaches equal sanctity to an acquittal produced by a blunder of the clerk or an error of the attorney general. * * * You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim that the law belongs to the court, and the facts to the jury. My duty is therefore to charge you that, while you will in this case form your own judgment of the facts, you will receive the law as it is given to you by the court." Whart. Hom. Append. 721.

To the same effect, though less explicitly developed, are the rulings by Sergeant, J., of this court, in Com. v. Van Sickle, Brightly, N. P. 73; and by Gibson, C. J., in Com. v. Harman, 4 Pa. 269. And this, also, seems to have been the later and better considered opinion of Judge Baldwin, whose charge in U. S. v. Wilson, Baldw. 99, is commonly quoted as authority on the other side. See his charge in U. S. v. Shive, Baldw. 512, Fed. Cas. No. 16,278.

I do not understand that the case of Kane v. Com. was intended to overrule or conflict with these decisions, and, notwithstanding the latitude of the language of the opinion, the real point decided did not go beyond the affirmation of the right to an instruction that "the jury are the judges of the law and the facts." In the present case it will be observed that the instruction asked was that the jury are "judges of the law as well as of the fact"; that is, of each, not merely of the joint result of both. For myself, I think even the formula that the jury are judges of the law and the facts objectionable, as tending to convey to the jury a wrong idea. The language of the Constitution is that the jury shall have the right to determine the law and the facts under the direction of the court. This is the accurate formula, and it means only that they have the right to determine the joint result of the law and the facts by a general verdict. This is the form which ought to be used when instruction on the subject is asked, and it ought to be accompanied by explicit instruction that the jury are not judges of the law, in all cases where there is any apparent danger that the jury will arrogate to themselves such function.

My conclusions on the general subject, therefore, are: (1) That the jury never were judges of the law in any case, civil or criminal, except incidentally, as involved in the mixed determination of law and fact by a general verdict. (2) Even if it could be conceded that they may have been so in primitive times, their right certainly ceased after the introduction of bills of exception and the granting of new trials, and admittedly has not existed in civil cases for centuries. (3) That there was not originally, nor is now, any distinction in this respect between civil and criminal cases, the true rule as to both being that "the immediate and direct right of deciding upon questions of law is intrusted to the judges; in a jury it is only incidental." Hargrave's note to Co. Litt. 155b.

The idea of a difference in the rights and functions of juries in civil and criminal cases, as to the determination of the law, arose from a misconception of the controversy over the right to give a general verdict, and was an error for which there is no respectable English authority, and which the best American authorities have overwhelmingly disapproved. And, even if the jury had originally had such right in criminal cases, it was an anomaly, belonging to the period when jurors were selected from the vicinage because of their knowledge of the case, and, like its congener, has changed and disappeared, because totally inconsistent with the functions of courts and juries, as now understood, with sound reason, and with common sense. And such change, if change it be, has the sanction of the constitutional provision that the jury shall determine, "under the direction of the court," of the legislative provisions for bills of exception, the review of the evidence in cases of murder, etc., and of the long-settled and incontestable power of courts to decide questions of evidence, to set aside verdicts and grant new trials without limit, except when controlled by the ancient maxim of the common law, embodied in our constitutional declaration of rights, that no man shall be twice vexed for the same offense.

This whole subject is discussed with exhaustive learning and ability in State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90. The opinion of the court by Hall, J., is the only serious attempt that I have been able to find to support the dogma for which it is now mainly responsible, and, with great respect for that eminent jurist, it appears to me that his whole argument is based on the confusion of the right to determine the law with the right to render a general verdict. A careful examination of all the authorities cited by him (and they include everything which the most learned and diligent research could discover) shows that they only go so far as to sustain the right of the jury not to be judges of or to determine the law, but only to apply it through a general verdict. The dissenting opinion of Bennett, J., in the same case, displays equal learning and sounder reasoning. It is a storehouse of information on the subject, and has anticipated everything that can be said upon it. A masterly analysis and review by Chief Justice Shaw will also be found in Com. v. Anthes, 5 Gray (Mass.) 185.

There are less elaborate, but equally clear and forcible, statements of the argument by Story, J., in U. S. v. Battiste, 2 Sumn. 240, Fed. Cas. No. 14,545; by B. R. Curtis, J., in U. S. v. Morris, 1 Curt. 23, 49, Fed. Cas. No. 15,815; by Gilchrist, J., in Pierce v. State, 13 N.

H. 536; and by Shaw, C. J., in Com. v. Porter, 10 Metc. (Mass.) 263. See, also, Montgomery v. State, 11 Ohio, 427; Montee v. Com., 3 J. J. Marsh. (Ky.) 149; Townsend v. State, 2 Blackf. (Ind.) 151 (but see Armstrong v. State, 4 Blackf. [Ind.] 247); Pierson v. State, 12 Ala. 153; Hardy v. State, 7 Mo. 607; Nels v. State, 2 Tex. 280; Brown v. Com. (1890) 86 Va. 466, 10 S. E. 745; a very able and compendious statement of the controversy in England while still raging, before the passage of the libel act, by Mr. Hargrave in his note to Co. Litt. 155b; an article by Chief Justice Wade, of Montana, in 3 Crim. Law Mag. 484; and one by the late Dr. Francis Wharton in 5 South. Law. Rev. (N. S.) 352 (reprinted in 36 Leg. Int. 405 and 1 Crim. Law Mag. 47); 7 Dane, Abr. 381–383; 2 Law Rep. 187; 15 Law Rep. 1; and State v. Buckley, 13 Am. Law Reg. (N. S.) 355.

As already said, there is not a single respectable English authority for the doctrine in question, and against the foregoing solid phalanx of the best American judicial and professional opinion I have not been able to find a single well-considered case, except State v. Croteau, which, as already seen, was by a divided court. Under these circumstances, whether the doctrine be of much practical importance or not, I cannot help thinking it a matter of regret that any vestige of it should be left in Pennsylvania.[61]

SECTION 7.—EVIDENCE

In this stage of the investigation it may be material for the prosecutor to know what parts of his indictment it will be necessary for him to substantiate with evidence. It is now settled that he must prove every statement which enters into the substance of the charge, but he will not be compelled to maintain any averments which, without being repugnant, are merely formal or superfluous. * * *

The common law did not, according to the stronger opinions, require any particular number of witnesses, or weight of other proofs, to convict a man of a particular offense, but left it altogether to the force of conviction as depending upon a variety of circumstances, far too diversified and subtle to be reduced within any precise boundaries.

* * *

No one ought to be convicted, before a felony is known to have been actually committed; so that no man should be found guilty of murder before the death of the party is actually ascertained, nor of stealing goods, unless the owner is known, merely because he cannot give an account in what way they came into his possession. But the circumstance that individuals have occasionally suffered on presumptive testimony, whose innocence has been afterwards ascertained, ought not to prevent juries from attending, with caution and deliberation, to this species of evidence; for the evil is comparatively small to that general impunity, which the worst offenders might obtain, if this kind of proof were never to be regarded. * * *

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[61] See also, State v. Burpee, 65 Vt. 1, 25 Atl. 964, 19 L. R. A. 145, 36 Am. St. Rep. 775 (1892); Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343 (1894); Roesel v. State, 62 N. J. Law, 216, 41 Atl. 408 (1898).

In general, however, it lies upon the prosecutor to prove the affirmative of the issue, and not on the prisoner to establish his innocence. * * *

The most usual mode of compelling the attendance of witnesses for the prosecution is by binding them over in a recognizance to appear and give evidence at the time of the examination before a magistrate. * * *

In prosecutions for misdemeanors the defendant has been from the earliest times allowed the writ of subpœna. But prisoners had no right, by the common law, to this compulsory process in capital cases without a special order of the court for that purpose. By 7 Wm. III, c. 3, § 7, in all cases of treason within that act, it is enacted that defendants "shall have the like process of the court to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear against them," so that the defendant may have a subpœna, or a habeas corpus, to bring up a witness who is a prisoner.

1 Chitty, Cr. Law, c. 14.

TYNDAL'S CASE.

(Court of King's Bench, 1632. Cro. Car. 291.)

Note, That the first day of this Term Hopestill Tyndal was arraigned at the bar for buggery, supposed to be committed at Hithe, being one of the Cinque Ports, he being indicted there, and the record removed hither by certiorari directed to "The Mayor and the Jurats" of the said vill, and not to "The Lord Warden of the Cinque Ports."

The prisoner challenged one of the jurors, being the foreman, who was sworn, and marked sworn by the clerk, before the challenge was heard by the court; and therefore without the assent of the Attorney General, then present, they would not alter the record; and because he would not assent to alter the record, the challenge was disallowed.

And afterwards, upon the evidence at the bar, divers witnesses were produced by the defendant, which were heard without oath; but some of them witnessing matter which the attorney general conceived would make for the king, were upon the desire of the said attorney sworn, and after ordered upon their said oath to deliver their knowledge.

The prisoner was afterwards acquitted: but because the evidence (if it had been believed by the jury) was very strong against the prisoner, RICHARDSON, Chief Justice, and JONES appointed, that the prisoner should be bound to his good behaviour; whereupon, against the opinion of myself and Justice BERKLEY, he was so bound.[62]

REX v. THOMAS.

(Court of King's Bench, 1613. 2 Bulst. 147.)

In an indictment against Walter Thomas for the killing of one George Conard tried at the Barre, by a Jury of Middlesex.

COKE, Chief Justice. This tryal here is publick, ut pæna ad paucos, metus ad omnes perveneret, the Jesuites have much slandered our Common Law, in the case of trialls of offenders for their lives, in the manner of their triall, in regard that Counsell, and also Examination of Witnesses upon Oath, is had, and admitted against a Delinquent: but a Delinquent to have no Counsell to speak for him, nor to have any Examination of Witnesses, upon Oath against him: in answer unto this. The Law of England, is a Law of Mercy; the Judge, before whom the triall is, is to look unto the Indictment, and to see, that the same be sound, and good in point of Law, the Judge ought to be for the King, and also for the party indifferent; and it is far better for a Prisoner to have a Judges opinion for him, than many Counsellors at the Barre; the Judges to have a speciall care of the Indictment, and to see that the same be good in all respects; and that Justice be done to the party. * * *[63]

PEOPLE v. COURTNEY.

(Court of Appeals of New York, 1884. 94 N. Y. 490.)

The indictment charged, in substance, that defendant, on the trial of an indictment against him for forgery, testified in his own behalf, and gave material testimony; that in answer to questions put to him on cross-examination, he falsely testified that he never went by any other name than that of Edward J. Courtney, that he never was an inmate of the Eastern Penitentiary of Pennsylvania, and that he never served a term of imprisonment in any prison. Defendant demurred to the indictment on the ground "that the facts stated in the indictment do not constitute a crime." The demurrer was disallowed.

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[62] By 1 Anne, St. 2, c. 9, it was enacted that in all cases of treason and felony all witnesses for the prisoner should be examined upon oath, in like manner as the witnesses against him. This right always existed in regard to inferior crimes. See 1 Chitty, Cr. Law, c. 14.

[63] Part of this case is omitted.

"To say the truth, we never read in any act of Parliament, ancient author, book, case, or record, that in criminal cases the party accused should not have witnesses sworn for him; and therefore there is not so much as scintilla juris against it. And I well remember when the Lord Treasurer Burleigh told Queen Elizabeth, 'Madam, here is your Attorney-General' (I being sent for) Qui pro Domina Regina sequitur; she said, she would have the form of the records altered, for it should be Attornatus Generalis qui pro Domina veritate sequitur. And when the fault is denied, truth cannot appear without witnesses." 3 Coke, Inst. 79.

On the trial, after proving the giving of the testimony as set forth in the indictment, the prosecution proved that defendant had been convicted and sentenced to imprisonment for three years in the Eastern Penitentiary of Pennsylvania, under the name of Christopher Richards, and that he served his term in that penitentiary. At the close of the evidence, defendant's counsel asked the court to direct an acquittal, upon the ground that the alleged false statements "were immaterial, irrelevant and in no way affecting the issue, and not the subject of an indictment." The court denied the request.

ANDREWS, J.[64] The argument in support of the demurrer to the indictment rests upon three propositions: First, that by section 6, art. 1, of the Constitution, no person can be compelled in a criminal case to be a witness against himself; second, that the act (chapter 678 of the Laws of 1869) violates this constitutional provision; and, third, that false swearing on the trial of an indictment, by the party indicted, on his examination, under the act of 1869, is not, therefore, legal perjury.

Whether the conclusion is a logical or legal deduction from the premises need not be considered, for the reason that the minor premise is not well founded. The act of 1869 is permissive, and not compulsory. It permits a person charged with crime to be a witness in his own behalf. But it does not compel him to testify, nor does it permit the prosecution to call him as a witness. He can be sworn only at his election, and the statute declares that his omission or refusal to testify shall create no presumption against him. The policy of the act of 1869 has been criticised in some cases in this court. But the policy or propriety of a law is a legislative, and not a judicial, question. The supposed moral coercion upon a person accused of crime to offer himself as a witness by reason of the adverse inference which might be drawn from his omission to testify, when presumably all the facts are known to him, is not compulsion within the meaning of the Constitution.

The Constitution primarily refers to compulsion exercised through the process of the courts, or through laws acting directly upon the party, and has no reference to an indirect and argumentative pressure such as is claimed is exerted by the statute of 1869. A law which, while permitting a person accused of crime to be a witness in his own behalf, should at the same time authorize a presumption of guilt from his omission to testify, would be a law adjudging guilt without evidence, and, while it might not be obnoxious to the constitutional provision against compelling a party in a criminal case to be a witness against himself, would be a law reversing the presumption of innocence, and would violate fundamental principles, binding alike upon the Legislature and the courts. The act of 1869 expressly precludes such a presumption from the silence of the accused, and, while it may be difficult for a jury in many cases to exclude the inference of guilt from an omission of a defendant to be sworn, we cannot assume that it may not be done. The statute assumes it to be possible, and we cannot say, judicially, that such assumption is unfounded. The demurrer was, therefore, properly overruled.

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[64] The arguments of counsel are omitted.

The only remaining question worthy of notice arises on the motion of the prisoner's counsel on the trial that the court should direct an acquittal on the ground that the matters on which the perjury was assigned were immaterial. It is true that the false testimony did not bear directly upon the main issue on the trial for forgery, but only upon the credit of the witness who gave material evidence on the merits. Evidence going to the credit of a witness who has given material evidence is relevant, because it helps the jury in determining the main issue. The recent cases sustain the view that perjury may be assigned upon false testimony, going to the credit of a witness. Reg. v. Glover, 9 Cox's Crim. Cas. 501; Reg. v. Lavey, 3 C. & K. 26; Arch. Crim. Pr. 817. False swearing in respect to such matter is not distinguishable in respect to moral turpitude from false swearing upon the merits, and, we think, there is no just reason for refusing to treat false swearing as perjury whenever the testimony is relevant to the case, although it may not directly bear upon the issue to be found. The questions are carefully considered in the opinions at General Term, and further elaboration is unnecessary.

The judgment should be affirmed. All concur.

Judgment affirmed.

COTTON v. STATE.

(Supreme Court of Alabama, 1889. 87 Ala. 103, 6 South. 372.)

SOMERVILLE, J.[65] Where a defendant in a criminal prosecution elects to become a witness in his own behalf, as he may do under the statute, he waives the constitutional guaranty which protects him from answering questions touching the merits of the case which may tend to criminate him. He may be examined by the state as to all material facts pertinent to his guilt, and his failure to explain or rebut any criminating fact, where he reasonably can do so, is a circumstance which may be considered by the jury as prejudicial to his innocence. This being so, it is clear in reason that his silence or refusal to testify as to such fact may become the subject of legitimate criticism on the part of the state's counsel, just as the testimony of any other witness may be under like circumstances; and the guilt or innocence of the defendant is to be determined on the entire evidence, including the testimony of the defendant himself. The authorities fully sustain this view. Clarke v. State, 87 Ala. 71, 6 South. 368, decided at the present term; Stover v. People, 56 N. Y. 315; State v. White, 27 Am. Rep. 137, note 144; Whart. Crim. Ev. (9th Ed.) §§ 432, 433; Clarke v. State, 78 Ala. 474, 56 Am. Rep. 45.

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[65] Part of this case is omitted.

It is only where the defendant fails to become a witness at all, or to request to become one, that section 4473 of the Code affords him any protection against the criticism of counsel. In such event, his failure to become a witness is not allowed to create any unfavorable presumption against him, nor to be the subject of any comment by counsel. Cr. Code 1886, § 4473.

The charge requested by the defendant was based on the false idea that nothing the defendant said, or failed to say, of a criminative character, should be allowed to have any weight whatever with the jury in securing his conviction; and erroneously affirmed that they should acquit him, unless they were satisfied beyond a reasonable doubt of his guilt by other evidence in the case, irrespective of his own testimony on the stand, including any implied admission of guilt. The charge was palpably erroneous, and was properly refused.

Affirmed.[66]

BURDEN OF PROOF.

If the jurors are in doubt of the matter and not certain, the judgment ought always in such case to be for the defendant.

Britton (Nichols' Trans.) 27.

COFFIN v. UNITED STATES.

(Supreme Court of the United States, 1894. 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481.)

Mr. Justice WHITE.[67] * * * The forty-fourth charge asked and refused was as follows: "The law presumes that persons charged with crime are innocent until they are proven, by competent evidence, to be guilty. To the benefit of this presumption the defendants are all entitled, and this presumption stands as their sufficient protection, unless it has been removed by evidence proving their guilt beyond a reasonable doubt."

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[66] Act 61 & 62 Vict. c. 36, allows the accused to be a witness for himself under oath. The act forbids counsel to comment on the prisoner's failure to take advantage of the privilege, but no such restriction is placed on the judge. Previous to this act, and after 1875, the accused was allowed in trials for certain crimes to testify under oath. Such statutes are general in this country.

[67] Part of this case is omitted.

Although the court refused to give this charge, it yet instructed the jury as follows: "Before you can find any one of the defendants guilty, you must be satisfied of his guilt, as charged in some of the counts of the indictment, beyond a reasonable doubt."

And again: "You may find the defendants guilty on all the counts of the indictment, if you are satisfied that, beyond a reasonable doubt, the evidence justifies it."

And finally, stating the matter more fully, it said: "To justify you in returning a verdict of 'Guilty,' the evidence must be of such a character as to satisfy your judgment to the exclusion of every reasonable doubt. If, therefore, you can reconcile the evidence with any reasonable hypothesis consistent with the defendants' innocence, it is your duty to do so, and in that case find the defendants not guilty. And if, after weighing all the proofs, and looking only to the proofs, you impartially and honestly entertain the belief that the defendants may be innocent of the offenses charged against them, they are entitled to the benefit of that doubt, and you should acquit them. It is not meant by this that the proof should establish their guilt to an absolute certainty, but merely that you should not convict unless, from all the evidence, you believe the defendants are guilty beyond a reasonable doubt. Speculative notions, or possibilities resting upon mere conjecture, not arising or deducible from the proof, or the want of it, should not be confounded with a reasonable doubt. A doubt suggested by the ingenuity of counsel, or by your own ingenuity, not legitimately warranted by the evidence, or the want of it, or one born of a merciful inclination to permit the defendants to escape the penalty of the law, or one prompted by sympathy for them or those connected with them, is not what is meant by a reasonable doubt. A 'reasonable doubt,' as that term is employed in the administration of the criminal law, is an honest, substantial misgiving, generated by the proof, or the want of it. It is such a state of the proof as fails to convince your judgment and conscience, and satisfy your reason of the guilt of the accused. If the whole evidence, when carefully examined, weighed, compared, and considered, produces in your minds a settled conviction or belief of the defendants' guilt—such an abiding conviction as you would be willing to act upon in the most weighty and important affairs of your own life—you may be said to be free from any reasonable doubt, and should find a verdict in accordance with that conviction or belief."

The fact, then, is that, while the court refused to instruct as to the presumption of innocence, it instructed fully on the subject of reasonable doubt.

The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

It is stated as unquestioned in the text-books, and has been referred to as a matter of course in the decisions of this court and in the courts of the several states. See 1 Tayl. Ev. c. 5, §§ 126, 127; Wills, Circ. Ev. c. 5, § 91; Best, Pres. pt. 2, c. 1, §§ 63, 64; Id. c. 3, §§ 31-58; Greenl. Ev. pt. 5, § 29, etc.; 11 Cr. Law Mag. 3; Whart. Ev. § 1244; 2 Phil. Ev. (Cowen & Hill's Notes) p. 289; Lilienthal's Tobacco v. U. S., 97 U. S. 237, 24 L. Ed. 901; Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708; Com. v. Webster, 5 Cush. (Mass.) 320, 52 Am. Dec. 711; State v. Bartlett, 43 N. H. 224, 80 Am. Dec. 154; Alexander v. People, 96 Ill. 96; People v. Fairchild, 48 Mich. 31, 11 N. W. 773; People v. Millard, 53 Mich. 63, 18 N. W. 562; Com. v. Whittaker, 131 Mass. 224; Blake v. State, 3 Tex. App. 581; Wharton v. State, 73 Ala. 366; State v. Tibbetts, 35 Me. 81; Moorer v. State, 44 Ala. 15.

Greenleaf traces this presumption to Deuteronomy, and quotes Mascardius De Probationibus to show that it was substantially embodied in the laws of Sparta and Athens. On Evidence, pt. 5, § 29, note. Whether Greenleaf is correct or not in this view, there can be no question that the Roman law was pervaded with the results of this maxim of criminal administration, as the following extracts show:

"Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day." Code, L. 4, tit. 20, 1, l. 25.

"The noble (divus) Trajan wrote to Julius Frontonus that no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent." Dig. L. 48, tit. 19, l. 5.

"In all cases of doubt the most merciful construction of facts should be preferred." Dig. L. 50, tit. 17, l. 56.

"In criminal cases the milder construction shall always be preserved." Dig. L. 50, tit. 17, l. 155, § 2.

"In cases of doubt it is no less just than it is safe to adopt the milder construction." Dig. L. 50, tit. 17, l. 192, § 1.

Ammianus Marcellinus relates an anecdote of the Emperor Julian which illustrates the enforcement of this principle in the Roman law. Numerius, the governor of Narbonensis, was on trial before the emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, "a passionate man," seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, "Oh, illustrious Cæsar! If it is sufficient to deny, what hereafter will become of the guilty? to which Julian replied, "If it suffices to accuse, what will become of the innocent?" Rerum Gestarum, lib. 18, c. 1. The rule thus found in the Roman law was, along with many other fundamental and humane maxims of that system, preserved for mankind by the canon law. Decretum Gratiani de Presumptionibus, L. 2, T. 23, c. 14, A. D. 1198; Corpus Juris Canonici Hispani et Indici, R. P. Murillo Velarde, Tom. 1, L. 2, n. 140.

Exactly when this presumption was, in precise, words, stated to be a part of the common law, is involved in doubt. The writer of an able article in the North American Review (January, 1851), tracing the genesis of the principle, says that no express mention of the presumption of innocence can be found in the books of the common law earlier than the date of McNally's Evidence (1802). Whether this statement is correct is a matter of no moment, for there can be no doubt that, if the principle had not found formal expression in the common-law writers at an earlier date, yet the practice which flowed from it has existed in the common law from the earliest time.

Fortescue says: "Who, then, in England, can be put to death unjustly for any crime? since he is allowed so many pleas and privileges in favor of life. None but his neighbors, men of honest and good repute, against whom he can have no probable cause of exception, can find the person accused guilty. Indeed, one would much rather that twenty guilty persons should escape punishment of death than that one innocent person should be comdemned and suffer capitally." De Laudibus Legum Angliæ (Amos' translation, Cambridge, 1825).

Lord Hale (1678) says: "In some cases presumptive evidence goes far to prove a person guilty, though there be no express proof of the fact to be committed by him; but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die." 2 Hale, P. C. 290. He further observes: "And thus the reasons stand on both sides; and, though these seem to be stronger than the former, yet in a case of this moment it is safest to hold that in practice, which hath least doubt and danger—'Quod dubitas, ne feceris.'" 1 Hale, P. C. 24.

Blackstone (1753–1765) maintains that "the law holds that it is better that ten guilty persons escape than that one innocent suffer." 2 Bl. Comm. c. 27, marg. p. 358, ad finem.

How fully the presumption of innocence had been evolved as a principle and applied at common law is shown in McKinley's Case (1817) 33 State Tr. 275, 506, where Lord Gillies says: "It is impossible to look at it [a treasonable oath which it was alleged that McKinley had taken] without suspecting, and thinking it probable, it imports an obligation to commit a capital crime. That has been and is my impression. But the presumption in favor of innocence is not to be redargued by mere suspicion. I am sorry to see, in this information, that the public prosecutor treats this too lightly. He seems to think that the law entertains no such presumption of innocence. I cannot listen to this. I conceive that this presumption is to be found in every code of law which has reason and religion and humanity for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman, and I was happy to hear from Lord Hermand he is inclined to give full effect to it. To overturn this, there must be legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty."

It is well settled that there is no error in refusing to give a correct charge precisely as requested, provided the instruction actually given fairly covers and includes the instruction asked. Tweed's Case, 16 Wall. 504, 21 L. Ed. 389; Railway Co. v. Whitton, 13 Wall. 270, 20 L. Ed. 571. The contention here is that, inasmuch as the charge given by the court on the subject of reasonable doubt substantially embodied the statement of the presumption of innocence, therefore the court was justified in refusing, in terms, to mention the latter. This presents the question whether the charge that there cannot be a conviction unless the proof shows guilt beyond a reasonable doubt so entirely embodies the statement of presumption of innocence as to justify the court in refusing, when requested, to inform the jury concerning the latter. The authorities upon this question are few and unsatisfactory.

In Texas it has been held that it is the duty of the court to state the presumption of innocence along with the doctrine of reasonable doubt, even though no request be made to do so. Black v. State, 1 Tex. App. 369; Priesmuth v. State, 1 Tex. App. 480; McMullen v. State, 5 Tex. App. 577. It is doubtful, however, whether the rulings in these cases were not based upon the terms of a Texas statute, and not on the general law. In Indiana it has been held error to refuse, upon request, to charge the presumption of innocence, even although it be clearly stated to the jury that conviction should not be had unless guilt be proven beyond a reasonable doubt. Long v. State, 46 Ind. 582; Line v. State, 51 Ind. 175. But the law of Indiana contains a similar provision to that of Texas.

In two Michigan cases, where the doctrine of reasonable doubt was fully and fairly stated, but no request to charge the presumption of innocence was made, it was held that the failure to mention the presumption of innocence could not be assigned for error in the reviewing court. People v. Potter, 89 Mich. 353, 50 N. W. 994; People v. Graney, 91 Mich. 648, 52 N. W. 66. But in the same state, where a request to charge the presumption of innocence was made and refused, the refusal was held erroneous, although the doctrine of reasonable doubt had been fully given to the jury. People v. Macard, 73 Mich. 15, 40 N. W. 784. On the other hand, in Ohio it has been held not error to refuse to charge the presumption of innocence where the charge actually given was "that the law required that the state should prove the material elements of the crime beyond doubt." Moorehead v. State, 34 Ohio St. 212.

It may be that the paucity of authority upon this subject results from the fact that the presumption of innocence is so elementary that instances of denial to charge it upon request have rarely occurred. Such is the view expressed in a careful article in the Criminal Law Magazine for January, 1889 (volume 11, p. 3): "The practice of stating this principle to juries is so nearly universal that very few cases are found where error has been assigned upon the failure or refusal of the judge so to do." But, whatever be the cause, authorities directly apposite are few and conflicting, and hence furnish no decisive solution of the question, which is further embarrassed by the fact that in some few cases the presumption of innocence and the doctrine of reasonable doubt are seemingly treated as synonymous. Ogletree v. State, 28 Ala. 693; Moorer v. State, 44 Ala. 15; People v. Lenon, 79 Cal. 625, 631, 21 Pac. 967. In these cases, however, it does not appear that any direct question was made as to whether the presumption of innocence and reasonable doubt were legally equivalent; the language used simply implying that one was practically the same as the other, both having been stated to the jury.

Some of the text-books, also, in the same loose way, imply the identity of the two. Stephen, in his History of the Criminal Law, tells us that "the presumption of innocence is otherwise stated by saying the prisoner is entitled to the benefit of every reasonable doubt." Volume 1, p. 438. So, although Best, in his work on Presumptions, has fully stated the presumption of innocence, yet, in a note to Chamberlayne's edition of that author's work on Evidence (Boston, 1883; page 304, note a), it is asserted that no such presumption obtains, and that "apparently all that is meant by the statement thereof, as a principle of law, is this: If a man be accused of crime, he must be proved guilty beyond reasonable doubt."

This confusion makes it necessary to consider the distinction between the presumption of innocence and reasonable doubt as if it were an original question. In order to determine whether the two are the equivalents of each other, we must first ascertain, with accuracy, in what each consists. Now, the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption, on the one hand, supplemented by any other evidence he may adduce, and the evidence against him, on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

Greenleaf thus states the doctrine: "As men do not generally violate the Penal Code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled." On Evidence, pt. 1, § 34.

Wills on Circumstantial Evidence says: "In the investigation and estimate of criminatory evidence, there is an antecedent, prima facie presumption in favor of the innocence of the party accused, grounded in reason and justice not less than in humanity, and recognized in the judicial practice of all civilized nations, which presumption must prevail until it be destroyed by such an overpowering amount of legal evidence of guilt as is calculated to produce the opposite belief."

Best on Presumptions declares the presumption of innocence to be a "presumptio juris." The same view is taken in the article in the Criminal Law Magazine for January, 1888, to which we have already referred. It says: "This presumption is in the nature of evidence in his favor [i. e. in favor of the accused], and a knowledge of it should be communicated to the jury. Accordingly, it is the duty of the judge, in all jurisdictions, when requested, and in some when not requested, to explain it to the jury in his charge. The usual formula in which this doctrine is expressed is that every man is presumed to be innocent until his guilt is proved beyond a reasonable doubt. The accused is entitled, if he so requests it, * * * to have this rule of law expounded to the jury in this or in some equivalent form of expression."

The fact that the presumption of innocence is recognized as a presumption of law, and is characterized by the civilians as a presumptio juris, demonstrates that it is evidence in favor of the accused. For, in all systems of law, legal presumptions are treated as evidence giving rise to resulting proof, to the full extent of their legal efficacy.

Concluding, then, that the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf, let us consider what is "reasonable doubt." It is, of necessity, the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them; in other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted.

The evolution of the principle of the presumption of innocence, and its resultant, the doctrine of reasonable doubt, make more apparent the correctness of these views, and indicate the necessity of enforcing the one in order that the other may continue to exist. While Rome and the Mediævalists taught that, wherever doubt existed in a criminal case, acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced this doctrine of doubt to its true origin—the presumption of innocence—and rested it upon this enduring basis. The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime.

The importance of the distinction between the two is peculiarly emphasized here, for, after having declined to instruct the jury as to the presumption of innocence, the court said: "If, after weighing all the proofs, and looking only to the proofs, you impartially and honestly entertain the belief," etc. Whether thus confining them to "the proofs," and only to the proofs, would have been error, if the jury had been instructed that the presumption of innocence was a part of the legal proof, need not be considered, since it is clear that the failure to instruct them in regard to it excluded from their minds a portion of the proof created by law, and which they were bound to consider. "The proofs, and the proofs only," confined them to those matters which were admitted to their consideration by the court; and, among these elements of proof, the court expressly refused to include the presumption of innocence, to which the accused was entitled, and the benefit whereof both the court and the jury were bound to extend him.

In addition, we think the twenty-second exception to the rulings of the court was well taken. The error contained in the charge, which said substantially, that the burden of proof had shifted, under the circumstances of the case, and that therefore, it was incumbent on the accused to show the lawfulness of their acts, was not merely verbal, but was fundamental, especially when considered in connection with the failure to state the presumption of innocence. * * *

Judgment reversed and case remanded, with directions to grant a new trial.[68]

PEOPLE v. POTTER.

(Supreme Court of Michigan, 1891. 89 Mich. 130, 50 N. W. 994.)

CHAMPLIN, C. J.[69] The respondent was tried upon the charge of violating what is known as the "Liquor Law." * * * We have a printed record containing a bill of exceptions, but we are not furnished with any assignments of error, nor with any brief on behalf of the respondent. We have examined the bill of exceptions, and find no errors contained therein. The only exceptions to the charge of the court about which anything need be said is the following: "Defendant, by his counsel, also then and there excepted to said charge, for the reason that said circuit judge failed therein to charge the jury that the respondent was presumed innocent until proven guilty." It was said in People v. Macard, 73 Mich. 25, 26, 40 N. W. 784, that the court should have charged the jury that the respondent was presumed innocent until proved guilty. People v. Murray, 72 Mich. 10, 40 N. W. 29. This is a duty which the court owes to a prisoner at the bar charged with a crime, in order that the jury may fully comprehend and understand that this presumption of innocence adheres until it is overcome by proof beyond a reasonable doubt to the contrary.

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[68] See, for discussion of this case, Thayer, Prelim. Treat. Ev. 551 et seq.

[69] Part of this case is omitted.

The learned Attorney General suggests that this duty does not apply to mere misdemeanors where intent is not an element of the crime, and where it has been held not to be error for the court to direct a verdict for conviction against the prisoner; but we think that the presumption exists in all cases of persons charged with a criminal offense, whether it be a statutory one, or one recognized as an offense at the common law. In either case, without some proof is introduced to overcome the presumption, the prisoner would be entitled to a verdict of acquittal. For this error the conviction must be reversed, and a new trial had.

McGrath, Morse, and Long, JJ., concurred.

Grant, J. (dissenting). * * * The charge of the court was fair and impartial. He instructed them that the "burden of proof was on the people to establish the defendant's guilt, by testimony introduced in court, to their satisfaction beyond a reasonable doubt;" and further instructed them that they were the exclusive judges of the facts. No errors are assigned, and no brief is filed on the part of the respondent. The only error claimed is that the court in his charge did not, of his own motion, instruct the jury that the respondent was presumed to be innocent until proven guilty. No intent was necessary to constitute this crime. People v. Waldvogel, 49 Mich. 337, 13 N. W. 620; People v. Blake, 52 Mich. 566, 18 N. W. 360; People v. Riley, 71 Mich. 349, 38 N. W. 922; People v. Neumann, 85 Mich. 98, 48 N. W. 290. The respondent's counsel did not request the court to thus instruct the jury. I can see no reason for holding that, under the circumstances of this case, the defendant was prejudiced.

The conviction should be affirmed, and the circuit judge advised to proceed to judgment on the verdict.

PEOPLE v. PALMER.

(Court of Appeals of New York, 1888. 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423.)

Appeal from General Term, Supreme Court, Third Department.

Indictment of Frank Palmer for the murder of Peter Bernard, in Clinton county, in 1885, followed by conviction. The General Term reversed the judgment, and ordered a new trial, and the people appealed.

Finch, J.[70] The prisoner was convicted of murder in the second degree, and that conviction reversed by the General Term because there was no direct evidence which identified the body found as that of the person alleged to have been murdered. From that decision the people appeal. * * *

It has always been the rule, since the time of Lord Hale, that the corpus delicti should be proved by direct, or at least, by certain and unequivocal, evidence. But it never was the doctrine of the common law that, when the corpus delicti had been duly established, the further proof of the identity of the deceased person should be of the same direct quality and character. And this becomes quite evident from a consideration of the history and philosophy of the rule. By the corpus delicti—the body or substance of the offense—has always been meant the existence of a criminal fact. Unless such a fact exists, there is nothing to investigate. Until it is proved, inquiry has no point upon which it can concentrate. Indeed, there is nothing to inquire about. But, when a criminal fact is discovered, its existence, for the purpose of a judicial investigation, must be established fully, completely, by the most clear and decisive evidence; for otherwise the after-reasoning founded upon it, and drawing its force from it, will be dangerous, fallacious and unreliable. As the weakness of the foundation is more and more intensified while the superstructure ascends and the weight grows, so the circumstantial evidence built upon a criminal fact, not certain to have existed, becomes itself weak and indecisive, and more and more so as the suspicions expand and extend. If somebody has been murdered, a motive for a murder becomes a significant fact, rendered more so when identification shows it a motive for the particular murder. But, if the death is doubtful, the probative force of a motive dwindles to mere suspicion.

In the case of Ruloff v. People, 18 N. Y. 179, the doctrine was both illustrated and applied. The death of the prisoner's infant child was not proved, but in its place was put the equivocal fact of a sudden and unexplained disappearance. The evidence might all be true, and yet the child be living and not dead; and, if living, every circumstance relied upon became at once fallacious and deceptive. Such circumstances gain their probative force only upon condition that there is a criminal fact which they serve to explain. But the corpus delicti—the existence of a criminal fact—may be completely established, and the need of direct proof satisfied, before the question of identity is reached. There may be direct proof of a murder, though no one knows the person of the victim. A dead body is found with the skull mashed in upon the brain, under circumstances which exclude any inference of accident or suicide. There we have direct evidence of the death, and cogent and irresistible proof of the violence; the latter the cause, and the former the effect; both obvious and certain, and establishing the existence of a criminal fact demanding an investigation. These facts proved, the corpus delicti is established, although nobody as yet knows, and nobody may ever know, the name or personal identity of the victim. Beyond the death and the violence remain the two inquiries to which the ascertained criminal fact gives rise: who is the slain, and who the slayer? the identity of the one, and the agency of the other. These may be established by circumstantial evidence which convinces the conscience of the jury, and because a basis has been furnished upon which inferences may stand and presumptions have strength. That I have correctly stated what is meant by the corpus delicti requiring direct proof, and that it never did include the identity of the victim, but left that open to indirect or circumstantial evidence, is shown by an unbroken and unvarying concurrence of authority. * * *

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[70] Part of this case is omitted.

The judgment of the General Term should be reversed, and that of the oyer and terminer of Clinton county affirmed.[71] All concur, except GRAY, J., dissenting.

REG. v. BURTON.

(Court for Crown Cases Reserved, 1854. 1 Dears. Cr. Cas. 282.)

John Burton was indicted at the January sessions, 1854, for the county of Middlesex, for stealing a quantity of pepper.

It was proved at the trial, by the person having charge of the warehouse, that the prisoner was seen coming out of the lower room of a warehouse in the London Docks, in the floor above which a large quantity of pepper was deposited, some in bags and some loose upon the floor, and that the witness, having suspicion of the prisoner from the bulky state of his pocket, stopped him and said, "I think there is something wrong about you," upon which the prisoner turned and said, "I hope you will not be hard with me," and threw a quantity of pepper out of his pocket on the ground. The witness further proved that no pepper was missed, and that he could not say from the large quantity of pepper that was in the warehouse that any had been stolen; but the pepper found on the prisoner was of the like description with the pepper in the warehouse.

The prisoner had no business in the warehouse.

It was contended by the prisoner's counsel, on the authority of R. v. Dredge, 1 Cox, Crown Cases, 235, that upon this state of facts the judge was bound to direct an acquittal. I overruled the objection, being of opinion that, notwithstanding the statement of the witness that he could not swear that any pepper was stolen, there was evidence to go to the jury.

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[71] The court decided that the provision of the Penal Code (section 181) which prohibits a conviction "of murder or manslaughter, unless the death of the person alleged to have been killed, and the fact of killing as alleged, are each established as independent facts, the former by direct proof, and the latter beyond a reasonable doubt," was merely declaratory of the existing rule of the common law.

The jury returned a verdict of guilty, and the question reserved for the consideration of the court is whether I ought to have directed a verdict of acquittal or to have left the case for the consideration of the jury.

If the court should be of opinion that the case ought not to have been left to the jury, a verdict of acquittal is to be entered.

Judgment on the conviction was postponed, and the prisoner was committed to the House of Correction at Coldbath Fields.

John Adams.

This case was argued on the 28th of January, 1854, before JERVIS, C. J., MAULE, J., WIGHTMAN, J., WILLIAMS, J., and PLATT, B.

Ribton, for the prisoner, cited the case of R. v. Dredge, 1 Cox, C. C. 235, as conclusive.

MAULE, J. The distinction is plain. That was the case of a little boy who asserted that the doll he was charged with having stolen was his own. Here the prisoner has a quantity of pepper about him, and says, not that it was his own property, but "Don't be hard upon me." The child conducted himself like an honest person.

Ribton: It is submitted that the corpus delicti must be proved in every case, and you cannot make any difference in the application of the rule.

MAULE, J. The offense must be proved. If a man go into the London Docks sober, without means of getting drunk, and comes out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen or any wine was missed.

Ribton: The corpus delicti must be proved.

MAULE, J. Where is the rule that the corpus delicti must be expressly proved?

Ribton: In Lord Hale it is so laid down.

MAULE, J. Only as a caution in cases of murder. He does not say it is to be observed in every case.

Ribton: But the principle would be the same in every case, and was adopted by Lord Stowell in Evans v. Evans, 1 Hagg. Con. Rep. 79. There is also the case of Hickson v. Evans, 6 T. R. 58. He would also refer to Starkie on Evidence, 862.

JERVIS, C. J. We are all of opinion that there is nothing in the objection. My Brother MAULE has already pointed out the clear distinction between this case and Rex v. Dredge.

Conviction affirmed.[72]

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[72] "I will conclude what I have to say on this subject, by a reference to a few obvious and well-established rules, suggested by experience, to be applied to the reception and effect of circumstantial evidence.

"The first is that the several circumstances upon which the conclusion

HARRIS v. STATE.

(Court of Appeals of Texas, 1889. 28 Tex. App. 308, 12 S. W. 1102, 19 Am. St. Rep. 837.)

WHITE, P. J. Appellant has been convicted of the murder of her infant babe, and her punishment has been assessed at a life term in the penitentiary. We are of opinion that the evidence establishing the corpus delicti is not sufficient to sustain the judgment, in so far as the same is made to appear in the record here before us. To warrant a conviction it was necessary for the state to prove that the child was born alive, that it had an existence independent of the mother, and that afterwards its life was destroyed by the act, agency, or procurement of its mother, this defendant. Wallace v. State, 7 Tex. App. 570, Id., 10 Tex. App. 255; Sheppard v. State, 17 Tex. App. 74. Defendant confessed that the child was born on Sunday night, that it was born alive, that she put it into Dr. Baldwin's spring, and that it was alive when she put it in the spring. The child was found the following Wednesday. Now, if the defendant's confessions were sufficient by themselves, perhaps we might hold that the corpus delicti had been sufficiently proved. These, however, in and of themselves, are not sufficient. The corpus delicti consists, not merely of an objective crime, but of the defendant's agency of the crime; and it is well settled that, unless the corpus delicti in both these respects is proved, a confession is not by itself enough to sustain a conviction. It must be corroborated. This can seldom be done by direct or positive testimony, but it may, as well, be shown by circumstantial evidence. Willard v. State, 27 Tex. App. 386, 11 S. W. 453, 11 Am. St. Rep. 197.

Now, what was the corroboration in this case? The doctor who testified as an expert says: "I cannot say positively whether the child was ever alive, or whether it had ever breathed." He dissected the

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depends must be fully established by proof. They are facts from which the main fact is to be inferred; and they are to be proved by competent evidence, and by the same weight and force of evidence, as if each one were itself the main fact in issue. Under this rule, every circumstance relied upon as material is to be brought to the test of strict proof; and great care is to be taken in guarding against feigned and pretended circumstances, which may be designedly contrived and arranged, so as to create or divert suspicion and prevent the discovery of the truth. * * *

"The next rule to which I ask attention is that all the facts proved must be consistent with each other, and with the main fact sought to be proved. * * *

"Another rule is that the circumstances, taken together, should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty, that the accused, and no one else, committed the offense charged. It is not sufficient that they create a probability, though a strong one; and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails." Commonwealth v. Webster, 5 Cush. (Mass.) 317-319, 52 Am. Dec. 711 (1850).

child's head, and found that the skull had not been fractured. He took out the lung, and applied the hydrostatic test, and found air in it—the usually accepted test that it had breathed. This was sufficient corroboration as to the fact that the child was born alive. Concede that the child had been born alive. Was it killed, or was it drowned? Evidently the doctor does not think it was killed by violence. As to the chances and probabilities that it had been drowned, he does not say one word. Why did not he make an examination, and give his opinion as to the fact of drowning? What evidence of drowning is there outside the confession? Was the child found in Dr. Baldwin's spring? If so, who found it there, and under what circumstances? Was Dr. Baldwin's spring of sufficient depth to drown the child? Was the spring in a public or secluded place? All these facts might have been testified to, and yet the record contains no such evidence. The first it discloses of the body is that somebody had found it, and it was under a box near the spring. Who found it in and took it out of the spring? Before we are asked to sanction so serious a verdict and judgment, even on the confession of a defendant, there ought to be furnished us some circumstances tending to corroborate that confession, since the law will not permit a conviction to stand alone upon the confession.

In this case, because the evidence is insufficient to establish the corpus delicti, the judgment is reversed, and the cause is remanded.[73]

DAVIS v. UNITED STATES.

(Supreme Court of the United States, 1895. 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499.)

Mr. Justice HARLAN delivered the opinion of the court.[74] * * * These extracts from the charge of the court present this important question: If it appears that the deceased was killed by the accused under circumstances which—nothing else appearing—made a case of murder, can the jury properly return a verdict of guilty of the offense charged if, upon the whole evidence, from whatever side it comes, they have a reasonable doubt whether, at the time of killing, the accused was mentally competent to distinguish between right and wrong, or to understand the nature of the act he was committing? If this question be answered in the negative, the judgment must be reversed; for the court below instructed the jury that the defense of insanity could not avail the accused unless it appeared affirmatively to the reasonable satisfaction of the jury that he was not criminally responsible for his acts.

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[73] Cf. Robinson v. State, 12 Mo. 592 (1849); Stephen v. State, 11 Ga. 225 (1852).

[74] Part of this case is omitted.

The fact of killing being clearly proved, the legal presumption, based upon the common experience of mankind that every man is sane, was sufficient, the court in effect said, to authorize a verdict of guilty, although the jury might entertain a reasonable doubt upon the evidence whether the accused, by reason of his mental condition, was criminally responsible for the killing in question. In other words, if the evidence was in equilibrio as to the accused being sane—that is, capable of comprehending the nature and effect of his acts—he was to be treated just as he would be if there were no defense of insanity, or if there were an entire absence of proof that he was insane. * * *

We are unable to assent to the doctrine that in a prosecution for murder, the defense being insanity, and the fact of the killing with a deadly weapon being clearly established, it is the duty of the jury to convict where the evidence is equally balanced on the issue as to the sanity of the accused at the time of the killing. On the contrary, he is entitled to an acquittal of the specific crime charged if, upon all the evidence, there is reasonable doubt whether he was capable in law of committing crime. * * *

Upon whom, then, must rest the burden of proving that the accused, whose life it is sought to take under the forms of law, belongs to a class capable of committing crime? On principle, it must rest upon those who affirm that he has committed the crime for which he is indicted. That burden is not fully discharged, nor is there any legal right to take the life of the accused, until guilt is made to appear from all the evidence in the case. The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive grounds of defense by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot, in the very nature of things, be regarded as proved, if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing crime.

This view is not at all inconsistent with the presumption which the law, justified by the general experience of mankind, as well as by considerations of public safety, indulges in favor of sanity. If that presumption were not indulged, the government would always be under the necessity of adducing affirmative evidence of the sanity of an accused. But a requirement of that character would seriously delay and embarrass the enforcement of the laws against crime, and in most cases be unnecessary. Consequently the law presumes that every one charged with crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. It authorizes the jury to assume at the outset that the accused is criminally responsible for his acts.

But that is not a conclusive presumption, which the law, upon grounds of public policy, forbids to be overthrown or impaired by opposing proof. It is a disputable, or, as it is often designated, a rebuttable, presumption, resulting from the connection ordinarily existing between certain facts, such connection not being "so intimate nor so nearly universal as to render it expedient that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; but yet it is so general and so nearly universal that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence." 1 Greenl. Ev. § 38. It is therefore a presumption that is liable to be overcome, or to be so far impaired, in a particular case that it cannot be safely or properly made the basis of action in that case, especially if the inquiry involves human life.

In a certain sense it may be true that, where the defense is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce some evidence that will impair or weaken the force of the legal presumption in favor of sanity. But to hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt, or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence by proving that he is not guilty of the crime charged. * * *

Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question, from the time a plea of not guilty is entered until the return of the verdict, is whether, upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged. His guilt cannot be said to have been proved beyond a reasonable doubt—his will and his acts cannot be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he willfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased.

As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of

"Guilty as charged" is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible criminally for his acts. How, then, upon principle, or consistently with humanity, can a verdict of guilty be properly returned, if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime? * * *

It seems to us that undue stress is placed in some of the cases upon the fact that in prosecutions for murder the defense of insanity is frequently resorted to, and is sustained by the evidence of ingenious experts whose theories are difficult to be met and overcome. Thus, it is said, crimes of the most atrocious character often go unpunished, and the public safety is thereby endangered. But the possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the courts to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice. No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.

For the reasons stated, and without alluding to other matters in respect to which error is assigned, the judgment is reversed, and the cause remanded, with directions to grant a new trial, and for further proceedings consistent with this opinion.

Reversed.[75]

STATE v. DE RANCÉ et al.

(Supreme Court of Louisiana, 1882. 34 La. Ann. 186, 44 Am. Rep. 426.)

The defendants were indicted for murder, and found guilty of manslaughter, and sentenced to imprisonment for five years, from which judgment they appealed, assigning as error the charge of the court that it must be established beyond a reasonable doubt that there existed, on the part of the accused, no capacity to discern right from wrong as to the act forming the basis of the charge. Unless the jury be satisfied in this respect, the presumption of sanity remains unshaken and needs no evidence in its support.

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[75] Accord: State v. Johnson, 40 Conn. 136 (1873); State v. Reidell, 9 Houst. (Del.) 470, 14 Atl. 550 (1888) [but see State v. Cole, 2 Pennewill, 344, 45 Atl. 391 (1899)]; Hodge v. State, 26 Fla. 11, 7 South. 593 (1890); Dacey v. People, 116 Ill. 555, 6 N. E. 165 (1886); Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408 (1889); State v. Nixon, 32 Kan. 205, 4 Pac. 159 (1884); People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162 (1868); Ballard v. State, 19 Neb. 609, 28 N. W. 271 (1886); State v. Jones, 50 N. H. 369, 9 Am. Rep. 242 (1871); Faulkner v. Territory, 6 N. M. 464, 30 Pac. 905 (1892); People v. Spencer, 179 N. Y. 408, 72 N. E. 461 (1904); Maas v. Territory, 10 Okl. 714, 63 Pac. 960, 53 L. R. A. 814 (1901); Dove v. State, 3 Heisk. (Tenn.) 348 (1872); Revoir v. State, 82 Wis. 295, 52 N. W. 84 (1892).

On appeal the court, through LEVY, J., affirmed the judgment; BERMUDEZ, C. J., taking no part in the decision.

On application for rehearing, the opinion of the court was delivered by

FENNER, J.[76] We have given much reflection and earnest consideration to the learned brief for rehearing filed herein by counsel for defendants, and especially to their views touching the law applicable to insanity as a defense in criminal prosecutions.

The presumption of innocence and the presumption of sanity are both embraced within the class of disputable presumptions of law, corresponding to the presumptiones juris of the Roman Law, which may always be overcome by opposing proof. 1 Greenl. Ev. § 33; 1 Wharton, Cr. L. § 707.

It cannot be sensibly urged that the presumption of sanity is the less powerful of the two, since it is the basis of all human responsibility, the foundation of all law, and the accepted guide of conduct in all the transactions and relations of mankind. Experience certainly demonstrates that, in prosecutions for crime, the presumption of innocence is rebutted a thousandfold more frequently than the presumption of sanity, and the application of any other test would not exhibit a different result. Inasmuch as human experience is the foundation of presumptions, this would seem to indicate that the presumption of sanity is the better founded and more powerful of the two. The doctrine that, in criminal cases, the guilt of the accused must be established beyond a reasonable doubt, rests on no other reason or principle than that such proof is necessary to overcome the presumption of innocence. Now, if, as we have shown, the presumption of sanity is of like character, and of equal, if not superior, strength, why should it be overcome by a less degree of proof?

It cannot be successfully maintained that in criminal cases the presumption of sanity is neutralized, or overcome, or nullified by the presumption of innocence. The weight of authority is overwhelming in favor of the doctrine that, when the state has established the corpus delicti in such manner that the accused, if sane, would be held guilty, the presumption of innocence is rebutted, and the presumption of sanity comes into full operation, to complete, by its own force, the case of the state, and that, if the accused relies upon the defense of insanity, the burden of proof is thrown upon him, and he must establish it by such proof as will rebut the presumption of sanity.

The question upon which English and American courts are mainly divided is as to the kind and degree of evidence required to effect such rebuttal.

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[76] Part of this case is omitted.

The question is not concluded by authority. Courts have propounded three theories, viz.: (1) That insanity, as a defense, must be proved beyond a reasonable doubt. (2) That the jury are to be governed by the preponderance of evidence. (3) That the prosecution must prove sanity beyond a reasonable doubt. Whart. Cr. L. § 55.

The last theory does not commend itself to our judgment, is supported, in its full extent, by few authorities, and is directly contrary to the jurisprudence of this court, as established in the only case in which the subject was directly considered, and where it was held that, "when insanity is pleaded in defense of a criminal act, it must be clearly shown that it existed at the time of the act," and that "every person is presumed to be sane until the contrary is proved, and it is for him who sets up this defense to prove it by evidence which will satisfy the minds of the jury that the party was insane at the time of the commission of the offense." State v. Coleman, 27 La. Ann. 691.

The joint opinion of the judges of England, delivered to the House of Lords, through Lord Chief Justice Tindall, declared that "the jury ought to be told, in all cases, that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction, and that to establish a defense on the ground of insanity, it must be clearly proved," etc. McNaghten's Case, 10 Clark & Fin. 210.

The doctrine, in nearly the same words, is announced by Mr. Greenleaf. 2 Greenl. Ev. § 373.

In Bellingham's Case it is said that Lord Mansfield instructed the jury that insanity "ought to be proved by the most distinct and unquestionable evidence; that, in fact, it must be proved beyond all doubt; and that there was no other proof of insanity that would excuse murder or any other crime."

In Oxford's Case, Lord Lyndhurst told the jury that "they must be satisfied, before acquitting the prisoner, that he did not know," etc., and then expressed his entire concurrence in the observations of Lord Mansfield, just quoted. 1 Russell on Cr. p. 9.

The English authorities are uniform to the effect that, in order to sustain the defense of insanity, the jury must be satisfied that it exists, and that the proof must be clear and convincing, and we do not understand even the decision of Lords Mansfield and Lyndhurst to go further than this, being satisfied that they only meant that the proof must be such as to exclude all reasonable doubt.

The Supreme Courts of Virginia, of Alabama, of Missouri, of Massachusetts, of Pennsylvania, of California, of New Jersey, and perhaps other states, have all held in accordance with the doctrine of this court in Coleman's Case that the burden of proof to rebut the presumption of sanity is on the defendant, and that insanity must be proved affirmatively, fully, and clearly, and in such manner as to satisfy the jury. It is true that several of the courts referred to qualify their expressions by saying, in effect, that though it must be proved clearly and to the satisfaction of the jury, yet it need not be proved beyond a reasonable doubt. The limitation is entirely inconsistent with the original proposition. That which leaves reasonable doubt in the mind cannot be said to be clearly proved. A mind vexed with reasonable doubts about a fact cannot be satisfied as to the existence of such fact.

Proof beyond reasonable doubt means nothing more, in the oft-quoted language of Chief Justice Shaw, than "that the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it." Webster's Case, 5 Cush. 320. As said by another learned court: "All that the law requires is moral certainty, which is that the jury, whether the evidence be positive or presumptive, should be satisfied. Giles v. State, 6 Ga. 276. Hair-splitting distinctions, under which some courts hold that, if the jury entertain only a reasonable doubt of the insanity, they must convict, but, if they entertain reasonable doubt of the sanity of the prisoner, they must acquit, do not commend themselves to our judgment. Sanity and insanity are opposite conditions, exclusive of each other. A reasonable doubt as to insanity is a reasonable doubt as to sanity, and vice versa.

We can understand that as to indifferent questions, not primarily solved by any presumption of law, and which the jury must solve one way or the other, there may arise a state of mind in which, though not clearly convinced either way, the juror must find in favor of that side which is least doubtful. But on a question primarily, and, until rebutted, conclusively, solved by a powerful presumption of law, we cannot understand how a jury can be justified in disturbing that existing status of legal satisfaction upon evidence which merely raises a doubt, however reasonable.

The doctrine that the jury must be governed by the preponderance of evidence is vague, uncertain, and unsatisfactory. The only evidence on the question of sanity and insanity, found in the case, might be evidence of the defendant, and although it might not be sufficient to raise more than the most shadowy doubt, the jury, under this doctrine, might be required to acquit. If, on the contrary, the presumption of sanity is to be considered as an element of weight in favor of the state, we are then remitted to the original question, as to what weight of contrary testimony will constitute preponderance.

Much reflection has convinced us that the doctrine of the English courts, and of this and other American courts which have followed them, is most conformable to reason, principle, and common sense.

The tendency of the opposite theory is, in our judgment, to emasculate our system of criminal justice, and to send juries adrift, without any reliable chart or compass, upon a sea of doubt and speculation.

The phenomena of the human mind are so mysterious, the boundaries between its normal and abnormal conditions so shadowy, the transports of frantic passion and the powerful impulses of vicious tendencies are so nearly akin to temporary mental derangement, that unless juries hold fast to the wholesome presumption of sanity, responsibility for crime will be seriously impaired, and society will lie at the mercy of evil-disposed men, who, while too sane to be confined in asylums, can yet raise a doubt as to whether they are sane enough to be punished for crime.

We stand by the doctrine of this court, in Coleman's Case, that insanity, when set up as a defense to a criminal charge, must be "clearly shown by evidence which will satisfy the minds of the jury that the party was insane at the time of the commission of the offense"; and we know of no definition of "proof beyond a reasonable doubt" which is not fully covered by this statement. Certainly, in this case, the judge meant, and sufficiently informed the jury that he meant, nothing more than this, because in other parts of his charge he distinctly told the jury, "Should the mental unsoundness of one or more of the accused, at the time of the commission of the offense, be established to the satisfaction of the jury, you will acquit him or them," and again, "If you believe that, at the time of the act they are accused of, they were not in such a mental condition as to create any responsibility on their part, acquit them." * * *

We remain satisfied of the soundness of the judge's rulings on all points, and the rehearing is refused.[77]

LEGG'S CASE.

(Newgate Sessions, 1662. Kelyng, 27.)

John Legg being indicted for the murder of Mr. Robert Wise, it was upon the evidence agreed, that if one man kill another, and no suddain quarrel appeareth this is murder, as Co. 9 Rep. fol. 67, b. Mackelly's Case. And it lyeth upon the party indicted to prove the suddain quarrel.

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[77] Accord: State v. Spencer, 21 N. J. Law, 196 (1846); State v. Murray, 11 Or. 413, 5 Pac. 55 (1884). See, and compare, Maxwell v. State, 89 Ala. 150, 7 South. 824 (1889); Bolling v. State, 54 Ark. 588, 16 S. W. 658 (1891); People v. Bemmerly, 98 Cal. 299, 33 Pac. 263 (1893); Fogarty v. State, 80 Ga. 450, 5 S. E. 782 (1888); People v. Walter, 1 Idaho, 386 (1871); State v. Trout, 74 Iowa, 545, 38 N. W. 405, 7 Am. St. Rep. 499 (1888); Moore v. Commonwealth, 92 Ky. 630, 18 S. W. 833, 13 Ky. Law Rep. 738 (1892); State v. Lawrence, 57 Me. 574 (1870); Commonwealth v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458 (1844); Commonwealth v. Heath, 11 Gray (Mass.) 303 (1858); State v. Hanley, 34 Minn. 430, 26 N. W. 397 (1886); State v. Shaefer, 116 Mo. 96, 22 S. W. 447 (1893); State v. Lewis, 20 Nev. 333, 22 Pac. 241 (1889); State v. Davis, 109 N. C. 780, 14 S. E. 55 (1891); Bond v. State, 23 Ohio St. 349 (1872); Ortwein v. Commonwealth, 76 Pa. 414, 18 Am. Rep. 420 (1875); State v. Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879 (1889); Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638

PADGETT v. STATE.

(Supreme Court of Florida, 1898. 40 Fla. 451, 24 South. 145.)

Taylor, C. J.[78] At the fall term, 1897, of the circuit court of Holmes county, William Padgett, the plaintiff in error, was tried upon an indictment charging him with murder, and was convicted of manslaughter, and sentenced to 15 years' confinement in the penitentiary, and from such sentence comes here on writ of error. * * *

The defendant's counsel requested the judge to give the following special charges: * * * (3) The law presumes the prisoner to be innocent, and it devolves upon the state to prove beyond a reasonable doubt that, at the time of the killing, the defendant was not in danger either of losing his life or suffering great bodily harm at the hands of the deceased; and if you believe from the evidence that the defendant was in danger of losing his own life, or of suffering great bodily harm, from the deceased, at the time he shot deceased, you will acquit him. * * *

The third instruction requested and refused is not sound law wherein it puts the burden upon the state of negativing beyond a reasonable doubt defensive matter, the burden of affirmatively showing which is upon the defendant, and that, too, whether the defendant affirmatively establishes such matter by proof or not. * * *

Finding no error, the judgment of the court below is affirmed.

STATE v. HAMILTON.

(Supreme Court of Iowa, 1881. 57 Iowa, 596, 11 N. W. 5.)

Rothrock, J.[78] * * * The defendant claimed that he was at another place when the robbery was committed. The court instructed the jury that the burden of proof was on the defendant to establish the fact that he was not present by a preponderance of evidence. This instruction was correct, and is now the settled law of the state. State v. Vincent, 24 Iowa, 570, 95 Am. Dec. 753; State v. Hardin, 46 Iowa, 623, 26 Am. Rep. 174; State v. Red, 53 Iowa, 69, 4 N. W. 831; State v. Kline, 54 Iowa, 183, 6 N. W. 184; State v. Northrop, 48 Iowa, 583, 30 Am. Rep. 408.

We find no error in the record. Affirmed.[80]

(1886); People v. Dillon, 8 Utah, 92, 30 Pac. 150 (1892); Baccigalupo v. Commonwealth, 33 Grat. (Va.) 807, 36 Am. Rep. 795 (1880); State v. Strauder, 11 W. Va. 745, 27 Am. Rep. 606 (1877).

[78] Part of this case is omitted.

[80] See, also, Cleary v. State, 56 Ark. 124, 19 S. W. 313 (1892); People v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402 (1898); Williams v. People, 121 Ill. 84, 11 N. E. 881 (1887).

Adams, C. J. (dissenting). In my opinion, if the evidence introduced to show that the defendant was at another place when the robbery was committed was such as to raise a reasonable doubt of his guilt, the jury would have been justified in acquitting. Now, it is manifest that such doubt might be raised by evidence which could not be said to preponderate over the evidence leading to a different conclusion. This court has never undertaken to abrogate the rule that a reasonable doubt of guilt is sufficient to justify an acquittal. It was, indeed, expressly held the rule in the very cases relied upon by the majority as holding that where the defendant relies upon proving an alibi he must prove it by a preponderance of evidence. Both rules cannot be correct, because they are inconsistent with each other. No jury can follow both.

Let us suppose a case where the evidence of an alibi does not preponderate, but does raise a reasonable doubt of guilt. What shall a jury do? If they follow the instruction that the evidence of an alibi must preponderate, they must convict and disobey the instruction as to reasonable doubt. On the other hand, if they follow the instruction as to reasonable doubt, they must acquit and disobey the instruction as to the evidence of an alibi. I cannot regard the rule adopted by the majority as to evidence of an alibi as being the established doctrine of this court, so long as it is inconsistent with another rule to which the court still adheres. If the court adopts the rule in question as to alibi, then, to be consistent, it should modify the rule as to reasonable doubt. The rule, as modified, would be as follows: A reasonable doubt of guilt is sufficient to justify an acquittal, unless it is raised by evidence of an alibi, and if it is, then it is not sufficient. But the rule adopted as to alibi appears to me to be wrong for another and still more cogent reason. In a civil action it is sufficient for the defendant to establish his defence by evidence which balances that of the plaintiff. According to the rule in question, adopted by the majority, the defendant in a criminal case must prove his innocence by evidence which overbalances the evidence introduced to prove his guilt, if the evidence of his innocence simply is that he was where he could not have committed the crime. The adoption of the rule in question requires a modification of the rule as to the presumption of innocence. The true doctrine under such rule would seem to be that the evidence of guilt is aided by a presumption of guilt, if the evidence of innocence relied upon is the evidence of an alibi.

The majority, it appears to me, have been misled by reason of the fact that there is generally a well-grounded suspicion attached to evidence of an alibi. It often comes from such sources that it should be greatly mistrusted. The most direct and positive testimony may often very properly be regarded as entitled to but little, if any, weight. But to the extent that it does have weight it should have the same effect which any other evidence of equal weight has. If it has weight enough to balance the evidence of guilt it should certainly be sufficient; and I think it should be sufficient if it raises a reasonable doubt. The views which I have expressed are supported by French v. State, 12 Ind. 670, where the question is very ably considered and the authorities reviewed. It is not to be denied that the rule now adopted by the majority finds some support in dicta which has crept into opinions in one or more cases in this court, and from implications arising from rulings in other cases; but we have never been asked before to go quite as far as we are asked to go now. An examination of the cases in which the dicta and implications are found will show that there has always been a minority unprepared to adopt the rule now adopted.

In my opinion the instruction cannot properly be approved, and I am authorized to say that Mr. Justice DAY concurs with me in this view.[81]

RAILING v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1885. 110 Pa. 100, 1 Atl. 314.)

GREEN, J.[82] The principal question in this case is that which relates to the admissibility of the dying declarations of Annie Faust. The defendant was charged with administering to her a drug with intent to procure a miscarriage, and it was also charged that her death resulted as a consequence. There were four counts in the indictment, and all of them charged the death of the woman as the result of the defendant's unlawful act. It is entirely unquestioned that dying declarations are admissible only in homicide cases, as a rule, and that the death of the deceased must be the subject of the charge, and the circumstances of the death the subject of the declaration. 1 Greenl. Ev. (13th Ed.) par. 156; Whart. Crim. Ev. 276; Whart. Am. Crim. Law, par. 669 et seq.

It is equally unquestioned that there is no grade of homicide involved in this case; the offense charged being the one commonly known as abortion. It is argued, however, with much force that the death of the woman, when it occurs, is a necessary ingredient of the offense under our statute, and therefore brings the case within the rule above stated. It is claimed that the death is, in part at least, the subject of the charge. In one sense this is true. But the question is, is it so in the real sense of the rule which controls the subject?

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[81] See, also, State v. Grinstead, 10 Kan. App. 74, 61 Pac. 975 (1900); Leslie v. State, 35 Fla. 171, 17 South. 555 (1895).

"In all statutory crimes it is competent for the Legislature to say that certain acts proven by the commonwealth shall be sufficient to make out a presumptive case against the accused, and cast the burden of proof upon him, provided the burden is not cast upon him to prove his innocence, without first requiring the commonwealth to prove some material fact or circumstance conducing to prove the guilt of the accused." Bennett, J., in Commonwealth v. Minor, 88 Ky. 427, 11 S. W. 474 (1889).

See, also, Commonwealth v. Williams, 6 Gray (Mass.) 1 (1856); State v. Hurley, 54 Me. 562 (1867). But see In re Wong Hane, 108 Cal. 680, 41 Pac. 693, 49 Am. St. Rep. 138 (1895). Cf. State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26 (1881).

[82] The statement of facts is omitted.

That inquiry involves the necessity of an examination of our criminal statute against abortion. It consists of two sections, the eighty-seventh and eighty-eighth of the Criminal Code of 1860. The eighty-seventh provides that if any person shall unlawfully administer any drug or substance to a pregnant woman, or use any instrument, with intent to procure her miscarriage, and she or the child shall die in consequence of such act, such person shall be guilty of felony and shall be sentenced to pay a fine not exceeding $500, and to undergo imprisonment at labor not exceeding seven years. The eighty-eighth section provides that if any person, with intent to procure the miscarriage of any woman, shall unlawfully administer to her any drug or substance, or use any instrument or other means with like intent, he shall be guilty of felony, and be sentenced to pay a fine not exceeding $500 and undergo an imprisonment at labor not exceeding three years.

In the last case the offense is complete without the death of the woman or child. In both cases the grade of the offense is the same—felony. In both, the acts done by the prisoner are the same. In the first, if those acts are followed by the death of the mother or child as a consequence, that is, in the relation of effect to a cause, a difference results in one of the penalties imposed. The possible fine is the same, but the possible imprisonment is longer—seven years instead of three. The facts which constitute the crime are precisely the same in both cases, to wit, the administering the drug, or using the instrument, with intent to procure a miscarriage. It follows that the death is no part of the facts which go to make up or constitute the crime. It is complete with the death or without it. The death, therefore, considered in and of itself, is not a constituent element of the offense. It may happen or it may not. If it does not happen, a certain possibility of penalty follows. If it does happen, the same character of penalty results, but with a larger possibility, not a certainty, in one of the items.

This seems to be a precise expression of the difference between the cases provided for in the two sections. This being so, the question recurs: is the difference between the two of such a character as to change the application of the rule of law relating to the admissibility of dying declarations? Of course they are not admissible if death does not result as a consequence from the unlawful acts. Therefore, if the woman should subsequently die from some entirely different and independent cause, her dying declarations in relation to a prior miscarriage would be clearly incompetent. In case she does die in consequence of the unlawful acts, the crime charged and tried is not homicide in any of its forms, but the felony of administering a drug or using an instrument with intent to produce a miscarriage. In its facts and in its essence it is the same crime that is charged and tried if no death results. The death, when it occurs, is an incident, the sole purpose of which is to determine whether the imprisonment of the defendant may be longer than when death does not occur. The facts which constitute the crime may not be proved by any declarations of the woman when death does not follow, or when it follows from some other cause.

Why, then, should the very same facts be proved by such declarations when death does result? Not because it is a homicide case and the rule as to dying declarations admits them in such cases, because it is not a case of homicide in any point of view. Not because the death is the subject of the charge, for the charge is the attempted or accomplished miscarriage by means of a drug or instrument. That crime is as fully completed without the death as with it. The death, therefore, is not an essential ingredient of it. Its function under the statute, when it occurs as a consequence, is not to determine the factum, or the character, or the grade of the crime, but the character of the penalty to be endured by the criminal. Of course, if the statute had declared that when death resulted, the offense should be manslaughter, or any other grade of homicide, the case would be entirely different. Then the death would be an essential ingredient of the offense, and would be the subject of the charge, and the rule as to dying declarations would apply. But such is not the case, and we do not think it wise to enlarge the operation of the rule so as to embrace cases other than homicide strictly.

The objections to the admission of such testimony are of the gravest character. It is hearsay, it is not under the sanction of an oath, and there is no opportunity for cross-examination. It is also subject to the special objection that it generally comes from persons in the last stages of physical exhaustion, with mental powers necessarily impaired to a greater or less extent, and, at the best, represents the declarant's perceptions, conclusions, inferences, and opinions, which may be, and often are, based upon imperfect and inadequate grounds. Nor is the reason ordinarily given for their admission at all satisfactory. It is that the declarant, in the immediate presence of death, is so conscious of the great responsibility awaiting him in the near future if he utters falsehood that he will, in all human probability, utter only the truth.

The fallacy of this reasoning has been many times demonstrated. It leaves entirely out of account the influence of the passion of hatred and revenge, which almost all human beings naturally feel against their murderers, and it ignores the well-known fact that persons guilty of murder beyond all question very frequently deny their guilt up to the last moment upon the scaffold. But, in point of fact, the reason we are considering cannot be regarded as the real or the controlling reason for the rule, because, in terms, it would be just as applicable to declarations made by dying persons in regard to civil affairs, or to all minor criminal matters, as to the facts attending a homicide. In truth, there would be less temptation to falsifying in regard to such matters than in regard to acts of violence perpetrated upon the person of the declarant. Yet it is undisputed that in all civil cases, and in all crimes other than homicide, such declarations are entirely incompetent.

A far better reason in support of the rule, as it seems to us, is that dying declarations are admitted from the necessity of the case, and in order that murderers may not go unpunished. Such a reason only can justify their admission in cases involving the life of the accused. While ordinarily the precautions against illegitimate testimony increase with the danger menacing the accused, in this one exceptional case of homicide they are relaxed, and the rule which excludes mere declarations in all other cases is removed.

In Whart. Crim. Ev. par. 278, the rule is thus stated: "Dying declarations are admitted from the necessity of the case to identify the prisoner and the deceased, to establish the circumstances of the res gestæ, and to show the transactions from which the death results." In 1 Greenl. Ev. (13th Ed.) par. 156, the writer says: "Those, or the like consideration, have been regarded as counterbalancing the force of the general principle above stated, leaving this exception to stand only upon the ground of the public necessity of preserving the lives of the community by bringing manslayers to justice. For it often happens that there is no third person present to be an eyewitness to the fact, and the usual witness in other cases of felony, namely, the party injured, is himself destroyed." In the footnote 2 to the above section the opinion of Judge Redfield is quoted in the following words: "But it was from a misapprehension of the true grounds upon which the declarations are receivable as testimony. It is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. What is said in the books about the situation of the declarant, he being virtually under the most solemn sanction to speak the truth, is far from presenting the true ground of admission."

Believing this to be the true ground upon which to place the admissibility of dying declarations, it will be seen at once that they are incompetent, except in cases of actual homicide, where the killing is the very substance and subject of the criminal accusation on trial. This we hold to be the true sense in which to interpret the rule that such declarations are only admissible where the death is the subject of the charge. All the text-books and a host of judicial decisions assert that the rule of admissibility is confined to cases of homicide. Thus this court in Brown v. Com., 73 Pa. 327, 13 Am. Rep. 740, states the rule, quoting from Whart. Am. Crim. Law, par. 669, in these words: "The dying declarations of a person who expects to die respecting the circumstances under which he received a mortal wound are constantly admitted in criminal prosecutions where the death is the subject of criminal inquiry, though the prosecution be for manslaughter, though the accused was not present when they were made, and had no opportunity for cross-examination, and against or in favor of the party charged with the death."

There is a vast number of cases in which, where the prisoner is tried for a crime other than homicide, the dying declarations of the person upon whom the crime was perpetrated are inadmissible, though they relate to the circumstances of the crime. Thus, in Rex v. Lloyd, 4 Car. & P. 233, it was held that on an indictment for robbery the declaration in articulo mortis of the party robbed is not admissible in evidence. Bolland, B., said: "I think that declarations in articulo mortis are not admissible in evidence to make out a charge of robbery; nor, indeed, any other charge except those in which the death of the deceased person, by whom the declaration was made, is the subject of the inquiry." A citation of this class of cases is not necessary, as they are quite familiar and are not at all disputed.

It only remains to consider the course of authority upon the very question now before us. It has never heretofore been before this court. But in England and several of the states it has been considered and determined, and the weight of authority seems to be quite decidedly against the admissibility of the evidence. Thus, in Rex v. Hutchinson, 2 Barn. & C. 608, note a, the prisoner was indicted for administering a drug to a woman pregnant but not quick with child, with intent to procure abortion. The woman was dead, and for the prosecution evidence of her dying declaration upon the subject was tendered. The court rejected the evidence, observing that, although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of the inquiry.

In Reg. v. Hind, 8 Cox, Cr. Cas. 300, the defendant was indicted for using instruments upon a woman with intent to produce an abortion, in consequence of which she died. It was held that her dying declarations in relation to the offense were inadmissible. The same course was followed in the state of New York in the case of People v. Davis, 56 N. Y. 95, where the statute is quite similar to our own; the penalty being increased when the woman dies in consequence of the unlawful acts. It was held that the dying declarations of the woman were incompetent on the general ground that the death was not the subject of the charge.

In the case of State v. Harper, 35 Ohio St. 78, 35 Am. Rep. 596, the same doctrine was held under a statute almost identical with ours. The Chief Justice said: "This was an indictment for unlawfully using an instrument with the intent of producing an abortion, and not an indictment for homicide. State v. Barker, 28 Ohio St. 583; People v. Davis, 56 N. Y. 96. The death was not the subject of the charge, and was alleged only as a consequence of the illegal act charged, which latter was the only subject of investigation. Did the court err in rejecting the dying declaration in proof of the charge? We think not. The general rule is that dying declarations are admissible only when the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the dying declaration. Rex

v. Mead, 2 Barn. & C. 605; 1 Greenl. Ev. 156; Rex v. Lloyd, 4 Car. & P. 233."

On the other hand, the Supreme Court of Indiana has held that such declarations were admissible in an indictment under a similar statute. Montgomery v. State, reported in 3 Crim. Law Mag. 523. In State v. Dickinson, 41 Wis. 299, the declarations were admitted, but by the statute of that state the offense is expressly made manslaughter where the woman dies, and the case was therefore one of homicide and within the rule. The case in Indiana appears to be the only one in a court of last resort in which the declarations have been held admissible. After a careful examination of the opinion in that case, and also of two other cases decided by courts of quarter sessions in our own state, we feel constrained to say that we think the better and safer rule is to limit the admissibility of dying declarations to cases of homicide only. We are therefore of opinion that the learned court below was in error in receiving the declarations of Annie Faust in this case, and for that reason the judgment must be reversed.

The second assignment is not sustained. The third, fourth, and fifth become immaterial in consequence of our decision rejecting the declarations. The sixth and seventh assignments are to some extent justified by the language of the charge, but we do not feel disposed to reverse on them. The eighth assignment is not sustained, and the ninth does not set out any specific words of the charge, and does not appear to be justified by its general substance.

The judgment is reversed, and the record is remanded to the court below for further proceedings, together with this opinion, setting forth the causes of reversal.[83]

BASYE v. STATE.

(Supreme Court of Nebraska, 1895. 45 Neb. 261, 63 N. W. 811.)

Norval, C. J.[84] At the January, A. D. 1894, term of the district court of Saunders county, the plaintiff in error was tried upon an information charging him with murder in the first degree, by having on the 14th day of December, 1893, unlawfully, purposely, and feloniously, and of his deliberate and premeditated malice, killed and murdered one William O. Wright. The prisoner was found guilty of murder in the second degree, and thereupon he moved to set aside the verdict, and for a new trial, which motion was overruled, and he was adjudged to be imprisoned in the state penitentiary at hard labor for the term of 20 years, from which judgment and sentence he prosecutes a petition in error to this court. * * *

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[83] Accord: Reg. v. Hind, Bell, 253 (1860); State v. Meyer, 64 N. J. Law, 382, 45 Atl. 779 (1900); Commonwealth v. Homer, 153 Mass. 343, 26 N. E. 872 (1891). Statutes in some states allow such evidence in this class of case. See Commonwealth v. Homer, supra.

[84] Part of this case is omitted.

Upon the trial the defendant offered to prove by two witnesses, D. O. White and James Casement, while they were upon the stand, that his reputation for honesty and integrity was good in the community where he lived. The court excluded the offered testimony, and of which action complaint is now made. The text-books and the adjudicated cases agree that in a criminal trial evidence of the previous good character of the defendant is always admissible as a fact for the jury to consider in determining the question of guilt or innocence. The character the defendant is entitled to prove must be consistent with the offense charged. For instance, in a prosecution for murder, his general reputation as a peaceable and quiet man is competent, but not his character for honesty and integrity. Had this prosecution been for larceny, then the offered evidence would have been admissible. Wharton, Criminal Evidence, § 60, and note 3. Several witnesses were introduced by the defendant who testified to his general reputation as a peaceable and law-abiding citizen. On cross-examination each, over the objection and exception of the defendant, stated that he had heard of the defendant having a quarrel with, and striking, a man several years before while he resided near Raymond.

It is argued that under the rule announced in Olive v. State, 11 Neb. 1, 7 N. W. 444, and Patterson v. State, 41 Neb. 538, 59 N. W. 917, the admission in evidence on cross-examination of specific facts tending to show the accused's reputation to be bad was erroneous. The precise point here raised was involved in and passed upon by the court in the cases mentioned above, in each of which it was held that the admission of such testimony upon cross-examination was reversible error. In the syllabus in each case it was correctly decided that, where a defendant in a criminal case has introduced evidence of his good character or reputation, the state in reply cannot prove particular facts in order to show it to be bad. This rule is a wise one, for the obvious reason that the accused is not expected to be prepared to meet a distinct and specific charge. The principle, however, was not correctly applied to the facts in the two Nebraska cases. It was upon cross-examination that the witness was interrogated as to specific matters. While particular facts are inadmissible in evidence upon direct examination for the purpose of sustaining or overthrowing character, yet this doctrine does not extend to cross-examination.

It is firmly settled by the adjudications in this country that upon cross-examination of a witness who has testified to general reputation questions may be propounded for the purpose of eliciting the source of the witness' information, and particular facts may be called to his attention, and asked whether he ever heard them. This is permissible, not for the purpose of establishing the truth of such facts, but to test the witness' credibility, and to enable the jury to ascertain the weight to be given to his testimony. The extent of the cross-examination of a witness must be left to the discretion of the trial court. The questions put to the several witnesses were within the scope of a legitimate cross-examination, and there was no abuse of discretion in permitting them to be answered. State v. Arnold, 12 Iowa, 480; Oliver v. Pate, 43 Ind. 132; Annis v. People, 13 Mich. 511; Rex v. Martin, 6 C. & P. (Eng.) 562; Leonard v. Allen, 11 Cush. (Mass.) 241; Ingram v. State, 67 Ala. 67; Tesney v. State, 77 Ala. 33; De Arman v. State, 71 Ala. 357; Jackson v. State, 78 Ala. 471; State v. Jerome, 33 Conn. 265; Carpenter v. Blake, 10 Hun (N. Y.) 358; Phillips, Evidence, 352; 1 Best, Evidence, § 261.

Another contention is that the court erred in refusing to allow the defendant to prove that the deceased was a quarrelsome and irritable man, and that he had made threats against the defendant, which were communicated to the accused the evening prior to the shooting. This evidence ought to have been received. In a homicide case, where it is claimed that the killing was in self-defense, evidence of the quarrelsome disposition of the deceased and the threats are proper elements for the jury to consider in determining whether the defendant was justified in taking the life of the deceased. * * * [85]

REGINA v. TAYLOR.

(Oxford Spring Circuit, Berkshire Assizes, 1839. 8 Carr. & P. 733.)

Arson. The prisoner was indicted for setting fire to the house of Robert Lyford, several persons (named in the indictment) being therein.

On the part of the prosecution, it was proposed to prove a confession made by the prisoner to Mr. Israel Winders.

It appeared that, on the morning of the fire, the prisoner, who was a servant of the prosecutor, was sent for into the parlor, in which Mrs. Lyford and Mr. Winders were, and that Mr. Winders, who was not a constable or in any office or authority, said to the prisoner, "You had better tell how you did it," and that she thereupon made an answer.

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[85] Compare Commonwealth v. Nagle, 157 Mass. 554, 32 N. E. 861 (1893).

"Good character cannot be disassociated from the other facts in the case, by referring to it alone as being sufficient to generate a doubt, any more than a similar reference could be made to any other fact in evidence. Under our rule, good character of the defendant is a fact in the case, in the light of which the other facts must be weighed. The fact of good character may generate a reasonable doubt, when without this fact the jury might be satisfied beyond a reasonable doubt of guilt. The same may be true of other facts in the case. The rule does not authorize the framing of a charge in such way as to give undue prominence to the fact of character, any more than to any other fact in the case." Coleman, J., in Murphy v. State, 108 Ala. 12, 18 South. 559 (1895). Compare Edmonds v. State, 34 Ark. 720 (1879).

J. J. Williams, for the prisoner: I submit that the statement of the prisoner is not receivable. Here is a direct inducement held out.

Patteson, J. Mr. Winders was not in any office or authority.

J. J. Williams: In two cases before Mr. Justice Bosanquet, confessions were excluded when made to a person not in authority when the inducement was held out by that person; and in the case of Rex v. Spencer, Mr. Baron Parke said that there was a difference of opinion among the judges whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable.

Patteson, J. It is the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority, and in this case I should have received the evidence of the statement made to Mr. Winders, if the inducement had been held out by him alone. But here the inducement does not rest with him alone, because Mrs. Lyford, who was the wife of the prosecutor, and also the mistress of the prisoner, was present with Mr. Winders, and must, as she expressed no dissent, be taken to have sanctioned the inducement. I think, therefore, that the inducement must be taken as if it had been held out by Mrs. Lyford, who was a person in authority over the prisoner, and that, therefore, the evidence is inadmissible.

Verdict—Not guilty.[86]

REX v. WARICKSHALL.

(Old Bailey, 1783. 1 Leach, Cr. Cas. 263.)

At the Old Bailey in April sessions 1783, Thomas Littlepage was indicted before Mr. Justice Nares, present Mr. Baron Eyre, for grand larceny; and the same indictment charged Jane Warickshall as an accessary after the fact, with having received the property, knowing it to have been stolen.

The accessary had made a full confession of her guilt; and in consequence of it the property was found in her lodgings, concealed between the sackings of her bed. The confession, however, having been obtained by promises of favor, the court refused to admit it in evidence against her; and it was contended by her counsel that, as the fact of finding the stolen property in her custody had been obtained through the means of an inadmissible confession, the proof of that fact ought also to be rejected, for otherwise the faith which the prosecutor had pledged would be violated, and the prisoner made the deluded instrument of her own conviction.

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[86] In some states it is provided by statute that a confession made by a person in custody is not admissible, unless such person were warned that the confession would be used against him. See State v. De Graff, 113 N. C. 688, 18 S. E. 507 (1893).

THE COURT. It is a mistaken notion that the evidence of confessions and facts which have been obtained from prisoners by promises or threats is to be rejected from a regard to public faith. No such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt that no credit ought to be given to it, and therefore it is rejected. This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source; for a fact, if it exist at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false. Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have been derived; and the impossibility of admitting any part of the confession as a proof of the fact clearly shows that the fact may be admitted on other evidence, for, as no part of an improper confession can be heard, it can never be legally known whether the fact was derived through the means of such confession or not; and the consequences to public justice would be dangerous indeed, for if men were enabled to regain stolen property, and the evidence of attendant facts were to be suppressed, because they had regained it by means of an improper confession, it would be holding out an opportunity to compound felonies. The rules of evidence which respect the admission of facts, and those which prevail with respect to the rejection of parol declarations or confessions, are distinct and independent of each other. It is true that many able judges have conceived that it would be an exceeding hard case that a man whose life is at stake, having been lulled into a notion of security by promises of favor, and in consequence of those promises has been induced to make a confession by the means of which the property is found, should afterwards find that the confession with regard to the property found is to operate against him. But this subject has more than once undergone the solemn consideration of the twelve judges; and a majority of them were clearly of opinion that although confessions improperly obtained cannot be received in evidence, yet that any acts done afterwards might be given in evidence, notwithstanding they were done in consequence of such confession.

SECTION 8.—VARIANCE

STATE v. HARRIS.

(Superior Court of Delaware, 1841. 3 Har. 559.)

The defendant was indicted for stealing "one pair of boots," and the proof was that he stole two boots mismatched, being the right boot of two pair. It was objected by his counsel that this proof did not sustain the indictment, and the objection was held good.

The object of certainty in an indictment is to inform the defendant plainly and precisely of what offense he is charged. This certainty must be not merely to a common intent, but to a certain intent in general, which requires that things shall be called by their right names, at least by such as they are usually known by. "One pair of boots" means two boots paired, matched, or suited to be used together.

The prisoner was indicted again.

REGINA v. GORBUTT.

(Court of Criminal Appeal, 1857. Dears. & B. Cr. Cas. 166.)

This case was considered on the 24th of January, 1857, by POLLOCK, C. B., WIGHTMAN, J., CRESSWELL, J., MARTIN, B., and WATSON, B.[87]

The judgment of the court was delivered on the 31st of January, 1857, by

CRESSWELL, J. The indictment in this case was against the defendant as a servant for stealing, not for embezzling. The evidence set out is rather long. It appears that the chairman put several questions to the jury, and he says the jury found a general verdict of guilty, and the court thereupon sentenced the prisoner to four years of penal servitude. He states a case to the Court of Criminal Appeal, and requests our opinion whether the prisoner has been duly convicted. Of course he means to inquire whether the evidence set out was such as would warrant a verdict of guilty of stealing. Now we think there is abundant evidence of embezzlement, but not evidence of stealing; and although, under the clause in the recent act of Parliament, a prisoner indicted for stealing may be convicted of embezzlement,[88] yet he cannot be convicted of stealing if there is only evidence of embezzlement; therefore we think the verdict was not warranted by the evidence, and the conviction must be reversed.

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[87] The opinion only is printed.

[88] Similar statutes exist in the United States. In Huntsman v. State, 12 Tex. App. 619 (1882), and State v. Harmon, 106 Mo. 635, 18 S. W. 128 (1891), such statute is declared to infringe the constitutional privilege of the accused to be informed of "the nature and cause" of the accusation against him.

Conviction quashed.

LONG v. STATE.

(Supreme Court of Nebraska, 1888. 23 Neb. 33, 36 N. W. 310.)

REESE, C. J.[89] * * * A number of objections are made to the instructions of the court, some of which we will next notice.

It is said that the court erred in giving instruction No. 5, given upon its own motion. This instruction is as follows: "Before you can find the defendant, Jefferson Long, guilty of aiding or abetting or procuring Ernest Meyers to commit murder in the first degree by killing Emily Boscombe, as charged in the indictment, you must be satisfied, beyond a reasonable doubt—First, that Ernest Meyers killed the deceased, Emily Boscombe, by striking her with a bludgeon, bolt, or club. * * *" The remainder of this instruction need not be quoted, as the objection is urged to the foregoing. The indictment charged the commission of the murder with a certain "bludgeon."

It is insisted that the words "bludgeon, bolt, or club" should not have been used in the instruction. The testimony failed to show the character of the instrument with which death was produced, the body of the deceased being almost entirely consumed by fire, the house in which she resided being burned over her body at the time of her death. There was some proof tending to show the description of an iron bolt or club soon after the death of deceased. While it is necessary that the character of the instrument used in producing death should be alleged in the indictment and described, and that the proof must agree with the allegations of the indictment, yet it is not essential that the testimony should prove the instrument to be the identical one charged, providing the death was produced in substantially the same way. It would not do to charge the defendant with the crime of murder by stabbing with a knife, and prove the murder to have been actually committed by striking with a club. Nor would it do to charge the murder to have been committed by shooting with a gun, and proving the act to have been by choking with the hand. But it is otherwise when the wound is produced by an instrument of the same class; as where it is charged that the death of the deceased was caused by a mortal wound on the head inflicted with a swingle, but it was proved that the death was caused by a blow on the head by a piece of wood. Whart. Crim. Ev. § 92.

In 1 Whart. Crim. Law, § 519, it is said: "The common-law rule in pleading an instrument of death is that, where the instrument laid and the instrument proved are of the same nature and character, there is no variance; where, if they are opposite nature and character, the contrary." "But if it be proved that the deceased was killed by any other instrument, as with a dagger, sword, staff, bill, or the like, capable of producing the same kind of death as the instrument stated in the indictment, the variance will not be material." It is very clear that "bolt, bludgeon, or club" would be the same class or character of instrument, and would produce the same class or character of wound by striking, and there would be no variance from the allegation that death was produced by a bludgeon. The instruction of the court was therefore correct.[90] * * *

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[89] Part of this case is omitted.

WALKER v. STATE.

(Supreme Court of Alabama, 1882. 73 Ala. 17.)

The defendant in the lower court, appellant here, was indicted for an assault and battery "with a weapon, to wit, a gun," and was convicted of an assault. The evidence for the state tended to show that the defendant was guilty of an assault and battery on the prosecutrix, but failed to show whether or not a weapon was used. The defendant made a statement under the statute, which tended to show that at the time of the alleged difficulty he had a gun, but that he did not strike the prosecutrix with it, or attempt to use it. The court charged the jury, among other things, that they "might find the defendant guilty of an assault with a weapon, or of an assault and battery, or of an assault, as they might determine from the evidence." To this charge the defendant excepted; and it is here assigned as error.

SOMERVILLE, J. The indictment charges the defendant with having assaulted and beat the prosecutrix "with a weapon, to wit, a gun."

The rule is that the mode of committing an offense must generally be proved as laid in the indictment, at least in substance. Roscoe's Cr. Ev. 89, 90. This principle embraces the instrument through the agency of which the crime is perpetrated. The evidence must show it to be of the same substantial nature with the description given. Precise conformity in every particular is never demanded, but it must be shown to correspond in general character and operation with the averments of the indictment. Such matters of description, even though alleged with unnecessary particularity, often become essential to the fact of identity. Whart. on Cr. Ev. (8th Ed.) §§ 91, 92; 1 Greenl. on Ev. § 65.

It is clear that if an indictment charges an assault and battery with a weapon, as is the case here, and the evidence shows that the offense was committed without a weapon, as with the hand or fist, there is a fatal variance. The charge of the court was erroneous in refusing to recognize this principle. Johnson v. State, 35 Ala. 363; 1 Bish. on Cr. Proc. §§ 485, 486; Rodgers' Case, 50 Ala. 102; 1 East, P. C. 341; Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143; Whart. on Cr. Ev. §§ 91, 92; 1 Greenl. on Ev. § 65.

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[90] The judgment was reversed on other grounds.

See, also, State v. Gould, 90 N. C. 658 (1884); Hull v. State, 79 Ala. 32 (1885); State v. Weddington, 103 N. C. 364, 9 S. E. 577 (1889); Rodgers v. State, 50 Ala. 102 (1874).

Reversed and remanded.

JOHNSON v. STATE.

(Supreme Court of Alabama, 1860. 35 Ala. 363.)

STONE, J.[91] * * * The indictment in this case charges that the assault upon Berry Freeman was committed by striking at him with a stick. The proof fails to show a striking at Berry Freeman, but only shows an attempt or offer to strike. This record, then, presents the familiar principle of unnecessary particularity of averment. Being descriptive of the offense, it became necessary to prove it as laid. The testimony failing in this particular, there was a variance between the averment and the proof. If the indictment had charged that the defendant made an assault, and struck at, etc., it is probable the doctrine of surplusage would apply. But the averment did not take that form. See Smith v. Causey, 28 Ala. 655, 65 Am. Dec. 372; Lindsay v. State, 19 Ala. 560; Commonwealth v. Gallagher, 6 Metc. (Mass.) 565; Roscoe's Cr. Ev. §§ 102–104; 2 Russ. on Cr. 788, 794, 795.

For the variance between the averment and the proof, the judgment of the circuit court is reversed, and the cause remanded.

FILKINS v. PEOPLE.

(Court of Appeals of New York, 1877. 69 N. Y. 101, 25 Am. Rep. 143.)

ALLEN, J.[91] The plaintiff in error was convicted in the Superior Court of the city of Buffalo of a felonious assault upon one Taylor with "a pitchfork, a sharp, dangerous weapon," without justifiable or excusable cause, and with intent to do bodily harm to said Taylor. * * *

It appeared upon the trial that a controversy existed between the accused and one Carpenter in respect to some fifty mules; the latter claiming a lien upon them for their keeping, and the former claiming them in right of and as the agent or bailee of his wife, the general owner.

At the time of the alleged assault they were in a barn owned by one Rogers, and in that half of it which there was evidence to prove had been rented by Filkins, and although Carpenter testified that he had, in his own name, rented one-half of the barn from the owner, there can be but little doubt that Filkins was the tenant in possession of the premises, and thus in actual possession of the mules. * * *

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[91] Part of this case is omitted.

Filkins saw that several of the mules had been taken out of the barn and were being led away, and sought to prevent the removal of the residue, but with the aid of a single man, and against the force opposed to him, was unable to close the barn. He found Taylor in the act of taking one of the mules from the stall, and with a pitchfork which he had in his hand struck him twice on or over the head.

The assault was by a blow, as with a stick or club, and not by pushing or thrusting with the tines.

As used, the weapon was no more dangerous than it would have been if there had been buttons on the tines to prevent their puncturing the flesh, or than would have been a knife held by the blade, the holder striking with the handle.

A blow thus given with the handle of a knife would not be an assault with a knife or sharp instrument, within the statute, any more than would an attempt to discharge a loaded gun, the touch-hole of which was plugged, be an offense under the English statute making it criminal to attempt to discharge a loaded gun at another. Rex v. Harris, 5 C. & P. 159; 1 Russ. on Cr. 979 (marg. 725). * * *

Judgment reversed.[93]

ENSON v. STATE.

(Supreme Court of Florida, 1909. 58 Fla. 37, 50 South. 948.)

Parkhill, J.[94] The plaintiff in error was convicted of the crime of grand larceny, and brings the judgment here by writ of error for review. * * *

At the close of the evidence the defendant requested the judge to give the following instruction to the jury: "The defendant in this case is charged with stealing certain bank bills and notes known as lawful currency of the United States of divers denominations, the number and denominations of which are alleged to be unknown to the county solicitor, and also certain silver specie, a more particular description, it is alleged, is unknown to the county solicitor, said property being alleged to be of the aggregate value of $100. It appears from the evidence that the county solicitor knew or could easily have known a better description at the time of the filing of the information than the description set forth in the said information. There is, therefore, a fatal variance, and you will accordingly find a verdict of not guilty."

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[93] See, also, Commonwealth v. Buckley, ante, p. 148; Rex v. Foster, ante, p. 150; Regina v. Davis, ante, p. 151; Rex v. Kettle, ante, p. 154; State v. Bassett, ante, p. 156; Regina v. Drake, ante, p. 159.

[94] Part of this case is omitted.

This instruction was properly refused, for the reason that there was no evidence that the county solicitor knew the number and denomination of the bank bills or a more particular description of the silver specie alleged to have been stolen, and the instruction erroneously predicated defendant's right to an acquittal on the fact that the county solicitor could easily have known a better description of the property than that given in the information. It asked too much. The question here is whether the allegation that a more particular description of the bank notes and specie was unknown to the county solicitor is sustained by the proof, not whether the county solicitor could easily have known a better description.

In some jurisdictions the rule is stated to be that a variance results where it becomes apparent from the evidence that the matter alleged as unknown might have been discovered by the exercise of ordinary diligence; but these cases would seem to be properly placed upon lack of diligence or carelessness in making the accusation, and not upon variance between the allegation and proof. The better rule would seem to be that to create a variance the fact of knowledge, not ability to acquire knowledge, must affirmatively appear from the evidence. The information alleges that a more particular description of the property is unknown to the solicitor. It becomes a question, then, upon all the evidence, of accord or variance between this allegation and the proof, not of diligence or carelessness in making the accusation.

It is doubtless true that, under the plea of not guilty, the allegation of want of knowledge of a better description of the property on the part of the county solicitor is traversable and the subject of inquiry, and that an indictment false in this respect would not support a conviction. But the defendant desires to go beyond the allegation of the information and raise the outside issue that the solicitor could easily have known a better description of the property. The fact that the county solicitor could easily have ascertained a better description of the property may be evidence that he knew the same; but it is not conclusive, and cannot be made an absolute test of the sufficiency of the allegation that he did not know. 22 Cyc. 465; Commonwealth v. Sherman, 13 Allen (Mass.) 248; Commonwealth v. Hill, 11 Cush. (Mass.) 137, text 141; Commonwealth v. Hendrie, 2 Gray (Mass.) 503; Commonwealth v. Thornton, 14 Gray (Mass.) 41; Commonwealth v. Stoddard, 9 Allen (Mass.) 280, text 282, 283; Commonwealth v. Noble, 165 Mass. 13, 42 N. E. 328; Wells v. State, 88 Ala. 239, 7 South. 272; Duvall v. State, 63 Ala. 12; Terry v. State, 118 Ala. 79, 23 South. 776; Winter v. State, 90 Ala. 637, 8 South. 556; White v. People, 32 N. Y. 465; Noakes v. People, 25 N. Y. 380; People v. Noakes, 5 Parker, Cr. R. (N. Y.) 292; People v. Fleming, 60 Hun, 576, 14 N. Y. Supp. 200; State v. Carey, 15 Wash. 549, 46 Pac. 1050; Rex v. Walker, 3 Camp. 264. See, also, Guthrie v. State, 16 Neb. 667, 21 N. W. 455; Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481; Rex v. Bush, Russ. & R. C. C.

372; Lang v. State, 42 Fla. 595, 28 South. 856; Com. v. Gallagher, 126 Mass. 54.

In discussing this question, the Supreme Court of Massachusetts, in Commonwealth v. Sherman, supra, said:

"The origin of the statement in some books that, if a name alleged to be unknown might with reasonable diligence have been ascertained by the prosecutor, the defendant is entitled to an acquittal, is probably to be found in some imperfect reports of English nisi prius cases. 2 East, P. C. c. 16, par. 89. King v. Deakin, 2 Leach (4th Ed.) 863; Rex v. Walker, 3 Camp. 264; Rex v. Robinson, Holt, N. P. C. 595. Upon such a case being cited Mr. Justice Littledale, an eminent common-law lawyer, said: 'The question is whether the person is known to the grand jury. It will be difficult to prove that he was so known, and unless he was known to the grand jury, I should doubt about that case.' Rex v. Cordy, 2 Russell on Crimes (3d Ed.) 98, note by Greaves. The earliest case which we have seen in which a traverse jury were required to find that the grand jury could not by reasonable diligence have ascertained the name was one tried at nisi prius before Mr. Justice Thomas Erskine. Regina v. Campbell, 1 Car. & Kirw. 82.

"By the much higher authority of the twelve judges of England, this matter has been put upon the right footing. In one case they held that an indictment against an accessory of a principal therein alleged to be unknown was good, although the same grand jury had returned another indictment against the principal by name. Rex v. Bush, Russ. & Ry. 372. And in another case, according to the fullest report, they stated the rule to be that, 'in order to sustain a count for the murder of a child whose name is to the jurors unknown, there must be evidence showing that the name could not reasonably have been supposed to be known to the grand jury.' Regina v. Stroud, 1 Car. & Kirw. 187. Another report of this case in 2 Mood. C. C. 270, by abridging this statement to 'the want of description is only excused when the name cannot be known,' wholly changes its meaning; for what the grand jury may reasonably be supposed to have known is only what it may be rightly inferred they did know, which is a quite distinct thing from that which they could know, or, in other words, reasonably might, but did not, ascertain. The judgments of this court support the position which we now affirm. Commonwealth v. Hill, 11 Cush. (Mass.) 141; Commonwealth v. Hendrie, 2 Gray (Mass.) 504; Commonwealth v. Thornton, 14 Gray (Mass.) 41; Commonwealth v. Stoddard, 9 Allen (Mass.) 282, 283.

"It is always open to the defendant to move the judge before whom the trial is had to order the prosecuting attorney to give a more particular description in the nature of a specification or bill of particulars, of the acts on which he intends to rely, and to suspend the trial until this can be done; and such an order will be made whenever it appears to be necessary to enable the defendant to meet the charge against him, or to avoid danger of injustice. Commonwealth v. Giles, 1 Gray

(Mass.) 469; The King v. Gurwood, 3 Ad. & El. 815; Rosc. Crim. Ev. (6th Ed.) 178, 179, 420."

As sustaining the right of the defendant to a bill of particulars upon a proper showing in this state, see Mathis v. State, 45 Fla. 46, 34 South. 287; Thalheim v. State, 38 Fla. 169, 20 South. 938; Eatman v. State, 48 Fla. 21, 37 South. 576; Brass v. State, 45 Fla. 1, 34 South. 307.

Our statute makes bank notes and money the subject of larceny, and where the required degree of certainty cannot be used in specifying the pieces or denominations of coins stolen or the number and denomination of bank bills, it will be enough to state that a better description than that given is unknown to the county solicitor, or to the grand jury, as the case may be. 12 Ency. Pl. & Pr. 990. * * *

Taylor, J. (dissenting). * * * According to my view of the law, there was a fatal variance between the allegation and the proofs, that entitled the defendant to his discharge. The true rule in such cases, according to my view, the one supported both by reason and the overwhelming weight of authority, is that it is only permissible upon the ground of necessity to allege in an indictment that the name of a person or fact necessary to be stated is unknown; and the defendant is entitled to be discharged when it appears on the trial that the name or the fact either was known or could by the exercise of ordinary diligence have become known to the grand jury or prosecuting attorney exhibiting the information. State v. Stowe, 132 Mo. 199, 33 S. W. 799; State v. Thompson, 137 Mo. 620, 39 S. W. 83.

The allegation in an indictment that the name of a person, or a fact, is unknown to the grand jurors, or to the prosecuting officer exhibiting an information, is a material one, is traversed by the plea of not guilty, and must be sustained, and may be rebutted by proof. Cameron v. State, 13 Ark. 712; Blodget v. State, 3 Ind. 403; Check v. State, 38 Ala. 227; Rex v. Robinson, 1 Holt, N. P. 595, s. c. 3 E. C. L. 233; Reg. v. Campbell, 1 Carr. & K. 82, 47 E. C. L. 80; Rex v. Walker, 3 Camp. N. P. 265; Reg. v. Stroud, 2 Moody, C. Cas. 270; Winter v. State, 90 Ala. 637, 8 South. 556; United States v. Riley (C. C.) 74 Fed. 210; Sault v. People, 3 Colo. App. 502, 34 Pac. 263; 1 Chitty's Crim. Law, 213; Presley v. State, 24 Tex. App. 494, 6 S. W. 540.

The facts alleged in the information to have been unknown to the prosecutor were material facts that the defendant had the legal right to demand an allegation of in the information. If these facts were in truth unknown to the prosecutor, and could not with ordinary diligence have been ascertained by him, then, and not until then, did the necessity arise or exist, which the law recognizes, permitting such facts to be alleged as being unknown. All the authorities agree that the allegation in an indictment to the effect that a name or a fact is unknown is a material averment, upon which issue is joined by the plea of not guilty, and I cannot agree with the few courts sustaining the majority opinion in their holdings to the effect that, if there is no proof either way as to whether the fact alleged to have been unknown was either known or unknown, the question is immaterial, and the defendant has no right to any advantage therefrom, and that the burden in such cases is on the defendant to prove, if he can, that the alleged unknown fact was in truth known to the grand jury or prosecutor.

I had thought that the law had been settled for ages that the burden was on the prosecution to prove every material averment in the indictment; but the holdings of these courts in this respect is a long step towards an uprooting of all the old landmarks that bound the haven of presumptive innocence until all material averments charging guilt are affirmatively established. My view is that, when an indictment alleges that a material fact is unknown to the grand jury or prosecuting officer, the burden is on the prosecution to show that such fact was in truth unknown, and could not with ordinary diligence have been ascertained, and that if such proof is not made there can be no conviction on such indictment.

SECTION 9.—VERDICT

If they [the jurors] cannot all agree in one mind, let them be separated and examined why they cannot agree; and if the greater part of them know the truth and the other part do not, judgment shall be according to the opinion of the greater part.

Britton (Nichols) lib. 1, 12b.

ANONYMOUS.

(Court of Common Bench, 1367. Lib. Ass. 233, pl. 11.)

In another Assize before the same Justices at Northampton the Assize was sworn, and they were all agreed except one who would not agree with the eleven; and then they were remanded, and remained there all that day and the next without drink or food. And then it was demanded of him by the Justices if he would agree with his companions. He said never. That he would die first in prison. And upon this a day was given on the same verdict in the Common Bench. Kirk prayed judgment on the verdict. THORP said they were all in accord that this was not a proper verdict taken of eleven, no verdict could be taken of eleven. Nevertheless Kirk showed how Wilby in trespass took the verdict of eleven and sent the twelfth to prison, and the attaint was sued against the eleven. And also W. Thorp in an assize in the twentieth year of the present King took the verdict of twelve (sic). THORP. This is not a precedent for us, for he was greatly reproved for that. And afterward by assent of all the Justices it was agreed that this was not a proper verdict. Wherefore it was decided that this panel should be quashed and annulled and that he who was in prison should be released and that the plaintiff should sue out a new venire to summon the Assize.[95]

When the jury have come to a unanimous determination with respect to their verdict, they return to the box to deliver it. The clerk then calls them over by their names, and asks them whether they are agreed on their verdict, to which they reply in the affirmative. He then demands who shall say for them, to which they answer, their foreman. This being done, he desires the prisoner to hold up his hand, and addresses them: "Look upon the prisoner, you that are sworn. How say you, is he guilty of the felony (or treason, etc.) whereof he stands indicted, or not guilty?" If they say, "Guilty," then he asks them, "What lands or tenements, goods or chattels the prisoner had at the time of the felony committed, or at any time since?" to which they commonly reply, "None to our knowledge." If they say, "Not guilty," then the clerk asks them "whether he did fly for it or not." They commonly answer, "not to our knowledge," but, if they find a flight, it is recorded. The officer then writes the word "guilty" or "not guilty," as the verdict is, after the words "po. se." on the record; and again addresses the jury: "Hearken to your verdict as the court hath recorded it. You say that A. B. is guilty (or not guilty) of the felony whereof he stands indicted, and that he hath no goods or chattels, and so you say all." * * *

The verdict thus given is either general to the whole of the charge, partial as to a part of it, or special, where the facts of the case alone are found, and the legal inference is referred to the judges.

1 Chitty, Criminal Law, 635.

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[95] "The parties to the litigation have 'put themselves' upon a certain test. That test is the voice of the country. Just as a corporation can have but one will, so a country can have but one voice—'le pays vint e dyt.' In a later age this communal principle might have led to the acceptance of the majority's verdict. But as yet men had not accepted the dogma that the voice of a majority binds the community. In communal affairs they demanded unanimity; but minorities were expected to give way. Then at this point the 'quasi judicial' position of the jurors becomes important. No doubt it would be wrong for a man to acquiesce in a verdict that he knew to be false; but in the common case—and it becomes commoner daily—many of the jurors really have no first-hand knowledge of the facts about which they speak, and there is no harm in a juror's joining in a verdict which expresses the belief of those of his fellows who do know something. Thus a professed unanimity is, as our rolls show, very easily produced. Nor must it escape us that the justices are pursuing a course which puts the verdict of the country on a level with the older modes of proof. If a man came clean from the ordeal or successfully made his law, the due proof would have been given; no one could have questioned the dictum of Omniscience. The veredictum patriæ is assimilated to the judicium Dei. English judges find that a requirement of unanimity is the line of least resistance; it spares them so much trouble." 2 Pollock & Maitland, History of English Law, p. 624.

REX v. LEGINGHAM.

(Court of King's Bench, 1670. 2 Keb. 687.)

Stroud on 1 Inst. 227, b, prayed to set aside a privy verdict on information for unreasonable distress, sed non allocatur, for unless in cases of Felony, where the Party must be present at the delivery, it may be private, and so hath been the constant practice of forty years, as well where the King alone is Party, as in Actions qui tam; but the Court conceived that no information lieth for this offense, unless it be said as common Oppressor or Barretor; also privy verdict may be out of the County well enough. But adjornatur.

COMMONWEALTH v. GIBSON.

(General Court of Virginia, 1817. 2 Va. Cas. 70.)

The prisoner was convicted of murder in the second degree, and five years fixed on as the term of his imprisonment. When brought up to receive his sentence, he moved the court "to set aside the pretended verdict alleged to be rendered against him, because the said pretended verdict is not the verdict of the jury sworn to try the prisoner, one of the jurors being absent from the rest, and out of the presence of the court at the time the said pretended verdict was received in the court, and at the time the jurors were discharged by the court, which was not known to the said prisoner, or his counsel, at the time of the rendition and reception of the said pretended verdict. He also moved the court to set aside the verdict (this ought to have been a motion to arrest the judgment), for that "he ought not by the laws of the land to be convicted of murder on the said indictment, the same being by law insufficient to charge him with the said crime." In support of his first proposition, he introduced Charles Woodson, one of the jurors, who, being sworn, said that he came into court with the rest of the jurors, after having agreed to a verdict against the prisoner, which was subscribed by Oglesby Scruggs, and that he remained in court until the jurors' names were all called over, and severally answered to, and, the clerk asking if the jury had agreed, it was answered they had, and the jury directed to look upon the prisoner, and, being asked if the prisoner was guilty or not, it was answered guilty, and the verdict delivered to the clerk, and the same that had been agreed to in the jury room, read aloud in open court; that being sick, and at this moment likely to faint, he requested one of the deputy sheriffs who was standing near him, in the rear of the jury, to attend him, and stepped into the jury room, where he laid down, and there remained until the jury were discharged; that he was not present in court at the discharge. Nor was he present when any alteration in the phraseology of the verdict was made in court, nor at any time after he had answered to his name, and heard the verdict which had been by the jury agreed on, in their room, read by the clerk as already stated. * * *

The evidence introduced by the prosecution satisfied the court that after the jury came into court, with their verdict written on the indictment and subscribed by one of their body, they were called over and answered severally to their names, declaring that they had agreed in a verdict, and, being told to look on the prisoner, they said he was guilty; the verdict was then delivered to the clerk, and by him read aloud in open court; the jury were not then immediately discharged by order of court, but some alteration in the terms of the verdict being suggested by the prosecutor, so as to make it read "public jail and penitentiary house," instead of "penitentiary," the clerk was ordered to make it in the presence of the court and jury. At this time it was not known that one of the jury had withdrawn. The clerk, to effect the alteration, wrote a verdict at large on the same indictment, in these words: "We of the jury find the prisoner guilty of murder in the second degree, and ascertain the term of his confinement in the public jail and penitentiary house to be five years," which was subscribed by William Watson, another of the jurors, and read aloud in open court, assented to by the jurors present, and the whole, being supposed to be present, were then discharged. The clerk ran his pen across the verdict delivered in by the jury in the first instance, without being directed so to do, that he might know which to regard in making up the record, and that the verdict which was at first delivered into court, and read as above stated, being the verdict agreed by the whole jury, is in these words: "We of the jury being impaneled for the purpose of trying Levi Gibson for the murder of his brother, Francis Gibson, are of opinion that the said Levi Gibson is guilty of murder in the second degree, and that he, the said Levi Gibson, be confined in the penitentiary for the term of five years." Signed: "Oglesby Scruggs."

On this statement and evidence, the superior court adjourned to this court the following questions:

(1) Can this court disregard the verdict which was written in court as above stated, and refer to the verdict which was first delivered by the jury into court, as above stated, as an existing verdict of the jury in the terms in which it is written? If so, (2) is this verdict sufficient to authorize this court to give judgment against the prisoner that he be confined in the "public jail and penitentiary house?" * * * [96]

The following is the judgment of THE COURT:

This court is of opinion, and doth decide, that the verdict which was written in court is a nullity, because it was only agreed to by eleven jurors, the twelfth juror having retired from the court before it was written and received, and that, therefore, the superior court ought to disregard the said verdict; and the court is further of opinion that, in a case of felony, after the verdict is rendered by the jury, and read in open court, it is the duty of the clerk to direct the jury to hearken to their verdict as the court has recorded it, and then to repeat the verdict to them, and either to poll them, or to say to them, 'And so say you all,' or words to that effect, in which latter case, if none of the jury express their dissent, the verdict ought to stand as recorded, and that until the assent of the jury is expressed in one of these ways the jury has a right to retract; and until after the assent of the jury is expressed as aforesaid, the verdict is not perfected; that the first verdict rendered in this case was imperfect in these particulars, and therefore no judgment can be rendered on it. * * *

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[96] Part of this case is omitted.

This court is further of opinion that, the verdict being imperfect, it ought to be set aside, and a venire facias de novo awarded, and a new trial had of the prisoner, either on this indictment, as an indictment for manslaughter, or on a new indictment for murder, which is ordered to be certified, etc.

STATE v. DAWKINS et al.

(Supreme Court of South Carolina, 1890. 32 S. C. 17, 10 S. E. 772.)

McIver, J.[97] * * * The ninth and tenth grounds of appeal question the legality of the course pursued in the court below after the verdict had been rendered, and the jury discharged from the case, by reimpaneling them the next day, for the purpose of giving them instructions, inadvertently omitted before, as to their power to recommend to mercy, and the effect of such recommendation. We do not know of any authority for such a proceeding, and none has been cited. While we have no doubt whatever that the course pursued in this instance was prompted by the best motives, and was really designed to give the defendants the benefit of a merciful provision of the law, yet we feel bound to regard it as a dangerous innovation, upon well-settled legal principles, and one which is not sanctioned by any law. After a jury have rendered their verdict, and have been discharged, we know of no authority by which they can be reimpaneled, and, under further instructions, be called upon to render a new and different verdict. Such a power, once recognized, even in a case like this, where its exercise was doubtless intended in favor of liberty, would afford a precedent which might lead to the most dangerous consequences. But, without pursuing this line of remark, it is quite sufficient for us to say that it is without authority of law. We must therefore regard the second so-called "verdict" as an absolute nullity, and the judgment, which we must assume was rendered upon it, as without legal foundation, and should for that reason be set aside.

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[97] Part of this case is omitted.

It may be said, however, that the first and only real verdict in the case would be sufficient to support the judgment. But it must be remembered that by the express terms of the statute (Gen. St. § 2481) the only judgment which would be legally rendered on that verdict would be imprisonment in the penitentiary with hard labor for life, and any other judgment would be erroneous and illegal; and, if so, then our plain duty is to reverse it. Now, while the nature of the judgment rendered in this case does not distinctly appear in the record, yet we are bound to infer from what does there appear that the judgment actually rendered was erroneous and illegal; for the act of 1883, amending the section of the General Statutes above referred to, expressly declares that where a person is convicted of burglary at common law, and is recommended to the mercy of the court by the jury, the punishment shall be reduced from that prescribed by that section of the General Statutes prior to the amendment. And as the manifest object of the circuit judge, in reimpaneling the jury, was to give these defendants the benefit of the reduction provided for, we are forced to the conclusion that the judgment rendered was based upon the second so-called "verdict."

The judgment of this court is that the judgment of the circuit court, so far as it concerns the appellant, William Dawkins, be reversed, and that the case be remanded to that court for a new trial as to said William Dawkins.[98]

COMMONWEALTH v. TOBIN.

(Supreme Judicial Court of Massachusetts, Suffolk, 1878. 125 Mass. 203, 28 Am. Rep. 220.)

Indictment for manslaughter. After verdict of guilty in the superior court, the defendant, on the same day, moved to set aside the verdict. * * *

Gray, C. J.[99] By the law of England, in cases of felony, the only verdict allowed was a public verdict pronounced by the foreman in open court, and in the presence of the prisoner. In prosecutions for misdemeanors, and in civil cases, although the jury were permitted to separate upon giving a privy verdict orally to the judge out of court, yet such verdict was of no force unless afterwards affirmed by an oral verdict given publicly in court, and the only effectual and legal verdict was the public verdict. 3 Bl. Com. 377; 4 Bl. Com. 360; 1 Chit. Crim. Law, 635, 636.

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[98] After the jury has been discharged, it is too late for a juror to say he did not assent to the verdict. Mercer v. State, 17 Ga. 146 (1855).

"Under our statute the verdict must be in writing; but this does not dispense with the requirements that the names of the jurors shall be called to ascertain that they are all present, and that they shall be asked if they all assent to the verdict." Maxwell, C. J., in Longfellow v. State, 10 Neb. 105, 4 N. W. 420 (1880).

[99] Part of this case is omitted.

In this country, by way of substitute for a privy verdict, and to attain the same end of allowing the jury to separate after they have come to an agreement, a practice has been adopted in civil actions, and in cases of misdemeanors, at least, if not of all but capital crimes, of directing the jury, if they should agree during the adjournment of the court, to sign and seal up their finding, and come in and affirm it at the next opening of the court; but the verdict which determines the rights of the parties, and is admitted of record, and upon which judgment is rendered, is the verdict received from the lips of the foreman in open court. When the jury have been permitted to separate after agreeing upon and sealing up a verdict, there is this difference between civil and criminal cases: In a civil action, if the written verdict does not pass upon the whole case, or the jury refuse to affirm it, the court may send them out again, and a fuller or different verdict afterwards returned will be good. But, in a criminal case, the oral verdict pronounced by the foreman in open court cannot be received, unless it is shown to accord substantially with the form sealed up by the jury before their separation. Lawrence v. Stearns, 11 Pick. 501; Pritchard v. Hennessey, 1 Gray, 294; Commonwealth v. Townsend, 5 Allen, 216; Commonwealth v. Durfee, 100 Mass. 146; Commonwealth v. Carrington, 116 Mass. 37; Dornick v. Reichenback, 10 Serg. & R. (Pa.) 84; Lord v. State, 16 N. H. 325, 41 Am. Dec. 729. * * *

In the case at bar, after the jury, upon their return into court, had been asked whether they had agreed upon their verdict, and the foreman had answered that they had, the form of verdict which had been signed and sealed up before the jury separated was silently delivered by the foreman to the clerk, and was opened and read by the clerk to the jury. The clerk thereupon told the jury (in the words accustomed to be used after a verdict has been pronounced by the foreman and minuted by the clerk) to hearken to their verdict as the court had recorded it. And the bill of exceptions states that "the above is all that was said."

In Commonwealth v. Carrington, already cited, upon which the Attorney General principally relies, the bill of exceptions stated that, before the verdict was recorded, the clerk asked the jury if their verdict was that the defendant was guilty, to which they assented; and, although the precise form in which such inquiry and response were expressed was not set forth in the bill of exceptions, it was assumed, both by the counsel and by the court, that an oral verdict had been returned in due form, if any such verdict could be received after the jury had separated and had brought in a sealed verdict.

But, in the present case, it distinctly appears that when the clerk told the jury to hearken to their verdict as recorded, no legal or effectual verdict had been returned by the jury, and they had not been asked, nor in any form of words orally and publicly stated, what their verdict was, and that, after they had been told that a verdict of guilty had been recorded, they simply said nothing. A verdict which has never been spoken by the jury cannot be implied from the mere omission of the jury to contradict the statements of the clerk, or from the silence of the prisoner and his counsel.

The verdict received and recorded by the court not being a legal verdict, it was the right of the defendant, upon his motion filed on the same day, to have it set aside. The order of the superior court, overruling this motion and denying him this right, was a decision upon a question of law which could not have been raised before verdict, and was therefore a proper subject of a bill of exceptions. Gen. St. c. 115, § 7. * * *

Exceptions sustained.

PEOPLE v. DAVIDSON.

(Supreme Court of California, 1855. 5 Cal. 133.)

Bryan, J.,[1] delivered the opinion of the court. Heydenfeldt, J., concurred.

This cause was tried in the court of sessions, for Placer county, upon an indictment charging the defendants with an assault with intent to commit murder. * * *

The verdict of the jury which finds the defendant guilty of an "assault with a deadly weapon, with intent to commit great bodily injury," is regular, and we deem that it finds the defendant guilty of a public offense. Section 424 of the act regulating proceedings in criminal cases provides that in all cases a person may be found guilty of an offense, the commission of which is necessarily included in that with which he may be charged in the indictment.

To find the defendant guilty of an "assault with intent to commit great bodily injury" is necessarily included in the charge of an assault with intent to commit murder. We find no error in the record sent up.

The judgment below is therefore affirmed, with costs.

HUNTER v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1875. 79 Pa. 503, 21 Am. Rep. 83.)

Mr. Justice Paxson delivered the opinion of the court, November 15, 1875.[1]

The plaintiff in error was indicted for a felonious assault. The jury convicted him of assault. A motion in arrest of judgment was made, which was overruled by the court below, and judgment entered on the verdict. This is assigned here for error.

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[1] Part of this case is omitted.

The record presents the single question whether, upon an indictment charging a felony, the jury may acquit of the felony, and convict of the constituent misdemeanor. We are in no doubt as to the rule at common law. It was long held in England that upon an indictment for a felony there could be no conviction for the minor offense of misdemeanor. Rex v. Cross, 1 Ld. Raym. 711, 3 Salk. 193; 2 Hawk. c. 47, § 6; 1 Chit. C. L. 251, 639. The reason of the rule was that persons indicted for misdemeanors were entitled to certain advantages at the trial, such as the right to make a full defense by counsel, to have a copy of the indictment, and a special jury, privileges not accorded to those indicted for a felony. It is apprehended these reasons no longer exist in England—at least not to the extent they did formerly, for by St. 1 Vict. c. 85, § 11 (Lord Denman's act), the rule itself has been abolished, and now upon a bill charging a felony a conviction may there be had for a constituent misdemeanor. It is clear that the reason of the rule has no application in this state. On the contrary, the advantages, if any, upon the trial, are all in favor of those charged with a felony. By the merciful provisions of our criminal law, the higher and more atrocious the crime, the more numerous are the safeguards thrown around the accused, and the more jealously does the law guard every legal right to which he is entitled.

The rule in other states of this country is by no means uniform. It is said by Mr. Wharton, in his work on Criminal Law (section 400), that the old common-law rule is still followed in Massachusetts, Indiana, and Maryland; while in New York, Vermont, New Jersey, Ohio, North Carolina, South Carolina, and Arkansas it has been held that, the reason of the English rule having ceased, the rule itself ceases, in obedience to the maxim "Cessante ratione legis cessat ipsa lex." A number of authorities are introduced by Mr. Wharton, which it is unnecessary to refer to here. The learned author places Pennsylvania as among the states in which the old common-law rule still prevails, and cites Commonwealth v. Gable, 7 Serg. & R. 433, in support of his text. The case referred to is authority only for what it decides. No such question was before the court. The contention there was whether, upon an indictment for murder, a conviction for manslaughter, without stating it was for voluntary manslaughter, could be sustained. The court held that the verdict was sufficiently certain; that it was to be presumed the jury meant voluntary manslaughter. It is true, Tilghman, C. J., who delivered the opinion of the court, recognized the common-law rule referred to; but it was assumed, not argued. Indeed, it could not well have been otherwise, as the point was not made. Black, C. J., also appears to have recognized the rule in Dinkey v. Commonwealth, 17 Pa. 127, 55 Am. Dec. 542, when he said that, "on an indictment for a felony, there cannot be a conviction for a minor offense included within it, if such minor offense be a misdemeanor." But this point was not before the court in Dinkey v. Commonwealth. All that case ruled was that an indictment for seduction under the statute includes the charge of fornication, and that a party indicted for seduction, and acquitted, may plead such an acquittal in bar of the subsequent indictment for fornication and bastardy on the same act, and the record will be a complete defense.

It will thus be seen that Dinkey v. Commonwealth, as well as Commonwealth v. Gable, are not authority to the extent claimed for them, and can hardly be said to support the rule. On the other hand, we are not without authority to support a conviction of a misdemeanor upon an indictment charging a felony. In Harman v. Commonwealth, 12 Serg. & R. 69, in which it was held that a count charging assault with intent to ravish might be joined with a count for rape, Tilghman, C. J., shows that as far back as 1772, upon an indictment charging rape, the defendant had been convicted of an assault with intent to ravish. In Shouse v. Commonwealth, 5 Pa. 83, the principle is laid down by Burnside, J.: "When a count in an indictment contains a divisible averment, it is the province of the jury to discriminate and find the divisible offense; and this distinction runs through the whole criminal law. It is enough to prove so much of the indictment as shows that the defendants, or any one of them, has committed a substantial crime therein specified." Justice Burnside then proceeds to cite Rex v. Dawson, 3 Starkie, 62, where an indictment charged the defendant with an assault with intent to abuse and carnally know a female child, and it was held that he might be convicted of an assault to abuse her simply. Stewart v. State, 5 Ohio, 242, where it was held that, on an indictment for an assault with an intent to murder, there may be a conviction of an assault simply; and adds: "This is the law and practice of Pennsylvania." The general rule is well settled that, upon an indictment charging a particular crime, the defendant may be convicted of a lesser offense included within it. Thus upon an indictment for murder the prisoner may be convicted of manslaughter; a person charged with burglary may be convicted of larceny, if the proof fail of breaking and entering; a person charged with seduction may be convicted of fornication (Dinkey v. Commonwealth, 17 Pa. 127, 55 Am. Dec. 542); when persons are indicted for riotous assault and battery, they may be convicted of assault and battery only (Shouse v. Commonwealth, 5 Barr, 83); when the charge is assault and battery, a conviction may be had for assault. Instances of this kind might be multiplied indefinitely if necessary. * * *

The judgment of the court of quarter sessions is affirmed.[3]

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[3] At the early common law it appears that not only could the accused be convicted for a misdemeanor on an indictment setting out the special circumstances of the case, charging the acts alleged to have been done feloniously, if the acts amounted to a misdemeanor only, Holmes' Case, Cro. Car. 376 (1634); Joyner's Case, Kel. 29 (1664), but even on a general indictment for felony, in which the misdemeanor was not charged, if a special verdict was found. Leeser's Case, Cro. Jac. 497 (1618). But in Westbeer's Case, 2 Str. 1133 (1740), one was indicted for feloniously stealing a parchment, and the jury found a special verdict by which it appeared that the parchment con-

WILLIAMS v. STATE.

(Supreme Court of Nebraska, 1877. 6 Neb. 334.)

LAKE, C. J.[4] * * * Another objection is that no valid verdict was returned—in other words, that it was a mere nullity, and not sufficient to support a judgment. It was in these words:

"We, the jury in this case, being duly impaneled and sworn, do find and say that ——— ——— is guilty of manslaughter.

"[Signed] H. H. Achey, Foreman."

It was conceded by the Attorney General that the omission to designate the prisoner in some manner as the person found to be guilty was a fatal defect. That it is so there can be no doubt whatever. We may have an abiding conviction that the prisoner was the one upon whom they intended to fix the guilt—that it could have been no one else—but this is not enough. The verdict of the jury is a step in the conviction of an individual for a felony that cannot be left to conjecture; but it must speak for itself as to every material fact, sensibly, without ambiguity, and with certainty, or it should be set aside. We regard this as a void verdict, and of no legal force or effect whatever. This, too, is an error that calls for a reversal of the judgment. * * *

Reversed and remanded.[5]

STATE v. GREEN.

(Supreme Court of North Carolina, 1896. 119 N. C. 899, 26 S. E. 112.)

FURCHES, J.[6] This is an indictment for a secret assault with a deadly weapon (a gun) with intent to kill, under chapter 32, Laws 1887. Under instructions from the court the jury found the defendant "guilty as accessory," and upon this verdict the court pronounced judgment, and the defendant appealed. * * *

We have no means of knowing from this indictment and verdict whether the defendant was convicted as accessory before or after the fact. But neither of these offenses is the same offense as that charged in the bill of indictment, nor is either one of them a less degree of the same offense as that charged in the bill. There were other mat-

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cerned the realty. The court held that, the prisoner being not guilty of the felony, he could not be convicted of the misdemeanor, and said, referring to the cases cited above: "In the cases cited pro rege, the judges appear to be transported with zeal too far."

[4] Part of this case is omitted.

[5] Accord: Where the verdict does not show on which of several counts the defendant is found guilty. Day v. People, 76 Ill. 380 (1875). Or to which of several defendants the verdict applied. People v. Sepulveda, 59 Cal. 342 (1881); Favor v. State, 54 Ga. 249 (1875). See, also, State v. Coon, 18 Minn. 518, Gil. 464 (1872); Wells v. State, 116 Ga. 87, 42 S. E. 390 (1902); State v. Pierce, 136 Mo. 34, 37 S. W. 815 (1896).

[6] Part of this case is omitted.

ters discussed in the argument before us that we do not consider and pass upon, as they are not likely to arise again upon a new trial. There is error, and a new trial is awarded the defendant.

New trial.

REX v. HEAPS.

(Court of King's Bench, 1699. 2 Salk. 593.)

Indictment, That the Defendants riotose & routose & illicite assemblaverunt, & sic assemblati existentes riotose & routose insultum fecerunt in quendam F. Russel, &c. Upon Not guilty, the Jury found two Defendants guilty, and acquitted the rest: And it was moved in Arrest of Judgment, that two cannot make a Riot, and therefore cannot be guilty of a Riot, and that all are acquitted by this Verdict: On the other Side it was said, That the Assault and Battery is charged in the Indictment as well as the Riot; and two Defendants may, as they are found, be guilty of that.

Sed per HOLT, C. J. A Riot is a specifick Offence, and the Battery is not laid as a Charge of itself, but as a Part of the Riot; for the Riotose & Routose runs thro' all, and is ascribed to the Battery as well as the Assembly. The Consequence is, That these Defendants being discharged of the Riot, are discharged likewise of the Battery; and no Judgment can be given; and Judgment was arrested.[7]

KLEIN v. PEOPLE.

(Court of Appeals of New York, 1864. 31 N. Y. 229.)

INGRAHAM, J.[8] The prisoner was indicted with Barbara Klein for grand larceny. When the case came on for trial, Klein pleaded guilty of an attempt to commit grand larceny. Myer was then tried and found guilty. The prisoner now moves in arrest of judgment, on the ground that both defendants must be convicted of the same offense, and not of different grades of offense. There can be no doubt that one defendant might have been acquitted and the other convicted, and such conviction have been good. And it has been held that where two are charged with a joint offense, either may be found guilty. R. v. Hempstead, R. & R. 344. But where persons are jointly indicted for a joint offense, they cannot be convicted of separate offenses; and if the act is indivisible, such as conspiracy or riots, then one cannot be convicted without the other. Stephens v. State, 14 Ohio, 388; State

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[7] See, also, Thetge v. State, 83 Ind. 126 (1882); Wright v. People, 33 Mich. 300 (1876).

[8] Part of this case is omitted.

v. McO'Blenis, 21 Mo. 272; Pennsylvania v. Huston, Add. (Pa.) 334. But, except in indictments for offenses necessarily joint, joint defendants may be convicted of different grades. Shorese v. Caw, 5 Barr. 83; R. v. Butterworth, R. & R., 520. And they may be convicted of different degrees of criminality in the same offense, where the defendants may act different parts in the same transaction. Thus, where two defendants are charged with murder in the same indictment, the jury may find one guilty of murder and another of manslaughter. United States v. Harding, 1 Wall. Jr. 127, Fed. Cas. No. 15,301; Mask v. State, 32 Miss. 406. So, in a charge of burglary, one may be convicted of burglary and another of grand larceny, where the first one broke open the house and the other afterwards entered, and the two committed the larceny. Russ. & Ry. C. C. 520.

In the present case, the prisoner Klein pleaded guilty of an attempt to commit grand larceny. This she might have done without necessarily being proven guilty of the further offense. After the plea was put in, she was considered as if she had been tried separately and acquitted, or convicted of a lesser grade. It did not prevent the trial of the prisoner Myer, nor his conviction of the whole charge, any more than if both had been indicted for murder, and one on a separate trial had been convicted of manslaughter; or, in an indictment for burglary, if one had been convicted of larceny, the other might afterwards be convicted of burglary.

I understand the rule to be, if both are convicted of offenses in the same continuing transaction, they may be convicted of different degrees, if the prisoners take different parts in the commission of the same offense.

The prisoner was properly convicted, and the judgment should be affirmed.[9]

REX v. TURNER et al.

(Old Bailey, 1663. Sid. 171.)

Turner and others were indicted for that they feloniously and burglariously broke the mansion house of Francis Tryan in a certain ward in London, and there stole money and jewels to the value of £5,000. And after not guilty pleaded, and much evidence, the jury found Turner guilty of burglary (for which he was afterward hung in Cheapside) and one of the sons guilty of felony (et the others they acquitted) and the question was if this was a good verdict as to the felony against the son. It seemed to the two Chief Justices and others that it was not; for, although the jury might have found all guilty of felony, they could not find one guilty of burglary and the others of felony upon the same indictment and the same evidence.

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[9] Compare Rex v. Hempstead, Russ. & Ry. 344 (1818).

COMMONWEALTH v. CAREY.

(Supreme Judicial Court of Massachusetts, Essex, 1869. 103 Mass. 214.)

Indictment on St. 1868, c. 141, with three counts; the first charging the defendant with unlawfully exposing intoxicating liquors for sale, and the second and third respectively with making different unlawful sales of intoxicating liquors. * * *

Morton, J.[10] It is well settled that several offenses may be charged in separate counts of the same indictment, if they are of the same general character and subject to the same kind of punishment; and whether they shall be tried separately or together is a matter within the discretion of the presiding judge. But, if they are tried together, the cardinal principles of the criminal law apply in the same manner as if each offense was charged in a separate indictment and tried separately. Each offense charged must be proved beyond reasonable doubt, by evidence legally applicable thereto. It necessarily follows that the jury must pass upon each count separately, and apply to it the evidence bearing upon the defendant's guilt of the offense therein charged. And if they fail to do so, their verdict cannot be sustained.

In the case at bar, the jury returned a general verdict of guilty; but, before it was affirmed and recorded, their foreman stated, in answer to a question by the court, that they did not pass upon the counts separately. It was thus made to appear in a proper manner that the jury, probably through misapprehension of the instructions given, had failed to perform the duty required of them, and that their verdict was unauthorized by law. It was undoubtedly a matter within the discretion of the presiding judge whether inquiry should be made of the jury as to the grounds or counts upon which they found their verdict; and if no inquiry had been made, the general verdict of guilty would apply to each count, upon the presumption that the jury had correctly understood and applied the instructions given them. But, the inquiry having been made, and having elicited the fact that the verdict had not been found in a manner authorized by law, it was erroneous in the court to order the verdict thus found to be affirmed and recorded.

Exceptions sustained.

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[10] Part of this case is omitted.

SELVESTER v. UNITED STATES.

(Supreme Court of the United States, 1897. 170 U. S. 262, 18 Sup. Ct. 580, 42 L. Ed. 1029.)

Mr. Justice Gray, Mr. Justice Brown, and Mr. Justice Shiras concurred in part,[11] as follows:

We concur in the judgment of affirmance, and upon this short ground: The indictment contained four counts. The defendant pleaded not guilty to the whole indictment, and thereby joined issue on each and all of the counts, and the jury might find the defendant guilty upon all or any of them. The jury did return a verdict of guilty upon each of the first three counts, and disagreed as to the fourth count. The jury thus answered the whole of the issue presented by the plea to each of the first three counts, and failed to answer the issue presented by the plea to the fourth count. Their failure to return a verdict on the fourth count did not affect the validity of the verdict returned on the other three counts, or the liability of the defendant to be sentenced on that verdict. The defendant was sentenced upon those counts only upon which he had been convicted by the jury. There is no error, therefore, in the judgment rendered upon the verdict.

But in so much of the opinion of the court as suggests that the plaintiff in error may be hereafter tried, convicted, and sentenced anew upon the fourth count, we are unable to concur. No attempt has been made to try him anew, and the question whether he may be so tried is not presented by this record. Upon principle, on one indictment, and against one defendant, there can be but one judgment and sentence, and that at one time, and for the offense or offenses of which he has been convicted; and a sentence, upon the counts on which he has been convicted by the jury definitely and conclusively disposes of the whole indictment, operates as an acquittal upon, or a discontinuance of, any count on which the jury have failed to agree, and makes any further proceedings against him on that count impossible. No case has been found in which, after a conviction and sentence, remaining unreversed, on some of the counts in an indictment, a second sentence, upon a subsequent trial and conviction an another count in the same indictment, has been affirmed by a court of error.

In Ballew v. U. S., 160 U. S. 187, 203, 16 Sup. Ct. 263, 40 L. Ed. 388, and in Putnam v. U. S., 162 U. S. 687, 715, 16 Sup. Ct. 923, 40 L. Ed. 1118, in each of which a judgment upon conviction on an indictment containing two counts was affirmed as to one count, and reversed as to the other count, the order of reversal did not direct a new trial on the latter count, but was guardedly framed in general terms "for such proceedings with reference to that count as may be in conformity to law"; and under such an order it would be open to the defendant, if set at the bar to be tried again on that count, to plead the previous verdict and sentence in bar of the prosecution.[12]

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[11] The statement of facts and the opinion of the court, delivered by Mr. Justice White, are omitted.

STATE v. ROWE.

(Supreme Court of Missouri, 1898. 142 Mo. 439, 44 S. W. 266.)

Burgess, J. At the July term, 1897, of the Greene county criminal court, defendant was convicted under an indictment theretofore preferred against him by the grand jury of said county, charging him with burglary in the second degree and larceny, and his punishment fixed at five years' imprisonment in the penitentiary. He then filed motions for a new trial, and in arrest, which being overruled, he saved his exceptions, and brings the case to this court by appeal. Defendant is not represented in this court. No bill of exceptions was filed, so that there is nothing for review other than the record proper. The indictment is free from objection, and in form often approved by this court. The verdict of the jury was a general one, simply stating: "We, the jury, find the defendant guilty as charged in the indictment, and assess his punishment at imprisonment in the state penitentiary for the period of five years." The verdict and judgment are part of the record in the cause. In Bateson v. Clark, 37 Mo. 31, it was said: "The record proper by law is the petition, summons, and all subsequent pleadings, including the verdict and judgment, and that the law has made it our duty to examine and revise; and, if any error is apparent on the face of these pleadings which constitute the record, we will reverse the cause, whether any exceptions were taken or not." Railway Co. v. Carlisle, 94 Mo. 166, 7 S. W. 102; Railway Co. v. Lewright, 113 Mo. 660, 21 S. W. 210; Lilly v. Menke, 126 Mo. 190, 28 S. W. 643, 994.

The defendant was charged with two separate and distinct offenses, to wit, burglary in the second degree (section 3524, Rev. St. 1889), and grand larceny (section 3535, Rev. St. 1889). For burglary in the second degree the punishment is fixed by statute at not less than three years' imprisonment in the penitentiary. Section 3528, Rev. St. 1889. By section 3529, Rev. St. 1889, it is provided that "if any person, in committing burglary, shall also commit a larceny, he may be prosecuted for both offenses in the same count, or in separate counts of the same indictment, and, on conviction of such burglary and larceny, shall be punished by imprisonment in the penitentiary, in addition to the punishment hereinbefore prescribed for the burglary, not less than two nor exceeding five years." It will be observed that the punishment prescribed by statute for the two different offenses is entirely different. While for the burglary it cannot be less than three years' imprisonment in the penitentiary, there is no limit for its duration. It may be for life; and for the larceny it cannot be less than two years, nor more than five years; so that the verdict must, of necessity, specify the offense of which the defendant is found guilty, and the punishment imposed for such offense, otherwise it will be invalid. There being two separate and distinct offenses charged, upon either one of which, or both, the defendant might have been convicted if the evidence was sufficient, and acquitted of one or altogether if insufficient, it is impossible to determine from the verdict whether the jury intended to find him guilty of both charges, or to find him guilty of one, and acquit him of the other, and, if the latter, of which one of the charges they intended to find him guilty. Such a verdict cannot stand. It is too indefinite and uncertain.

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[12] Where the counts are for the same offense, see Commonwealth v. Fitchburg R. R., 120 Mass. 372 (1876).

"It was held at an early day, in this court, that one good count was sufficient to uphold a general verdict and judgment upon all the counts, though some of them might be bad." Nelson, J., in Clifton v. U. S., 4 How. 250, 11 L. Ed. 957 (1846).

Contra: O'Connell v. Reg., 11 Cl. & F. 155 (1844). And see Avirett v. State, 76 Md. 510, 25 Atl. 676, 987 (1893).

In State v. Pierce, 136 Mo. 34, 37 S. W. 815, there is quoted with approval the following, from 3 Grah. & W. New Trial, p. 1078: "The verdict must be certain, positive, and free from all ambiguity. It must convey on its face a definite and precise meaning, and must show just what the jury intended. An obscurity which renders it at all doubtful will be fatal to it." And from 1 Bish. Cr. Proc. (3d Ed.) § 1005, the following: "If the verdict does not find the issue presented by the record, but some other, or is silent in some element of the offense, no valid judgment can be recorded upon it, and it should be set aside; or if the meaning of it is uncertain, as, for example, if it does not show which of two defendants is meant to be convicted, or on which of two counts the conviction is, the consequence is the same." State v. Harmon, 106 Mo. 635, 18 S. W. 128.

A verdict which is not so responsive to the charge alleged in the indictment as to afford the defendant protection against another prosecution for the same offense is manifestly erroneous, and the verdict in this case is of that character. It makes no difference that both offenses were charged in the same count. It is true that a different conclusion was reached in State v. Butterfield, 75 Mo. 297, in which it was held that a general verdict of guilty under an indictment charging both burglary and larceny in the same count of the indictment was sufficient; but that case was not well considered, is clearly not in line with the authorities, and especially the more recent decisions of this court in State v. Harmon, supra, and State v. Pierce, supra, and should be overruled.

For these reasons, we reverse the judgment, and remand the cause for further trial, in accordance with the views herein expressed.

GANTT, P. J., and SHERWOOD, J., concur.

COMMONWEALTH v. CALL.

(Supreme Judicial Court of Massachusetts, Suffolk and Nantucket, 1839. 21 Pick. 509, 32 Am. Dec. 284.)

The defendant was tried in the municipal court upon an indictment for adultery committed within the county of Suffolk, and the jury returned the following special verdict, dated the 23d of March, 1838, and signed by the foreman: "The jury find the defendant guilty of having had sexual intercourse with Eliza Foster, the person named in the indictment, she at the same time being an unmarried woman, and the defendant being a married man and having a lawful wife at the time then living." * * *

Dewey, J.[13] * * * This brings us to the second objection taken to the sufficiency of this verdict, which is that the jury have not found that the offense charged upon the prisoner was committed within the county of Suffolk.

It is a very familiar principle in the administration of the criminal law, that all the circumstances essential to sustaining the indictment must be expressly found by the jury, and the court cannot supply a defect in the finding of the jury by intendment or implication. 1 Chitty's Crim. Law, 644; Bac. Abr. Verdict, D.

It is equally clear that it must always appear that the jury have found the offense was committed within the county in which the indictment is found, or the court cannot give judgment against the prisoner. 1 Stark. Cr. Pl. 354; The King v. Hazel, 1 Leach, 406.

In the ordinary case of a general verdict of guilty, the jury, by the very terms of their verdict, find the prisoner guilty of all the material allegations in the indictment. Not so in a special verdict, for the very object of this departure from the usual form is presumed to be for the purpose of declaring the prisoner guilty of certain facts only, with a view of submitting the question whether those facts authorize a general verdict of guilty to the judgment of the court. In such a case, if the facts thus found do not include all the essential elements of the offense charged upon the prisoner, he cannot be convicted.

The finding of the jury in the present case shows the defendant guilty of acts constituting the crime of adultery, but is entirely defective as to the fact where the crime was committed. The facts found by the jury may all be truly found, and yet they may have occurred in an adjacent county, or out of the commonwealth. We cannot judicially know that the offense was committed in the county of Suffolk, the jury not having so said, either directly or by any reference to the indictment in their verdict.

The court are therefore of opinion that it was not competent for the municipal court to render a judgment upon this verdict, that the jury had found the prisoner guilty of the offense as charged in the indictment, and to this extent the exception taken to the ruling of the judge must be sustained.

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[13] Part of this case is omitted.

The only remaining inquiry is whether this defect in the finding of the jury entitles the prisoner to a judgment as upon a verdict of not guilty.

The finding of the jury here was altogether an imperfect and defective finding, and therefore not available either to the government as a verdict of guilty, or to the prisoner as a verdict of acquittal. It neither affirms nor denies as to the truth of any allegations in the indictment, other than as to the facts specially stated in the verdict. Had it found the prisoner not guilty except as to the matter thus specially stated, it would have been effectual to discharge the prisoner and would be tantamount to a verdict of acquittal; but in its present form it cannot operate as such, and the result will be that the prisoner must be put again on his trial. 1 Chitty's Crim. Law, 646; Rex v. Woodfall, 5 Burr. 2661; Rex v. Hayes, 2 Ld. Raym. 1522.

The bill of exceptions is sustained, and the case remanded to the municipal court for a new trial.

STATE v. FRENCH.

(Supreme Court of Louisiana, 1898. 50 La. Ann. 461, 23 South. 606.)

BREAUX, J.[14] The state in this case appealed from an order sustaining a motion in arrest of judgment. The defendant was prosecuted upon an information containing two counts. In one count, he was charged with having stabbed with intent to murder; in the other count, with having willfully and maliciously, with a dangerous weapon, inflicted a wound less than mayhem. The verdict found was, "Guilty of wounding less than mayhem." * * *

The defendant avers that the verdict, "Guilty of wounding less than mayhem," is not responsive to the offenses charged in the information. In the first place, it is evident that the verdict was not a general verdict, but one that the jury found without special reference to the offense charged in either count of the information. It was a verdict of their own selection. They had been instructed by the court regarding the form of the verdict, as follows: "You may render one of five verdicts. (1) You may find the prisoner at the bar, 'Guilty as charged in the first count of the information;' (2) you may find him, 'Guilty of stabbing with a dangerous weapon with intent to kill,' as charged in the first count; (3) you may find him, 'Guilty as charged in the second count;' (4) you may find him, 'Not guilty;' or (5) you may find him, 'Not guilty, on the ground of insanity.' If you find the defendant was insane at the time of the commission of the act, you should qualify your verdict of 'Not guilty' by the addition of the phrase 'on the ground of insanity.'" The jury did not follow the instruction. It was within their power to find a particular verdict in language of their own, and if it covers an offense denounced by the statute, or an offense of a lower degree, included under the terms and conditions of the offense charged, it would be a sufficient verdict.

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[14] Part of this case is omitted.

Taking an example of the most ordinary sort, the charge being murder, the jury may find the defendant guilty of manslaughter; or, the charge being burglary, if larceny only be proven the accused may be found guilty of larceny; so in all cases of offense of less degree of the same class. But the finding of the jury in such cases must be of an offense complete in itself. The offense must be completely stated. No valid judgment can be pronounced upon the partial verdict, which fails to find the ingredients essential to constitute the crime.

To illustrate by another example of a familiar kind: If a jury were to return in court that an accused was guilty of taking the goods of another without any intimation as to the asportation and appropriation of the goods, it is useless to state that the finding would be void. Not so if they were to return that he is "guilty of larceny," for that word embraces all the ingredients essential to constitute the crime of stealing. Larceny, manslaughter, and other words denoting crimes have a well-defined meaning. They are in themselves a definition. No one can be misled, or there need not be the least confusion, when these names are made use of. If the jury undertakes to define the crime, it should be by a name in which there can arise no confusion or ambiguity, or, if it is not identifiable by a well-known name, then the description should include the essentials to constitute the crime. In one case in this state, the court went to the extreme of holding that only a general verdict could, under the law, be found. State v. Jurche, 17 La. Ann. 71. That limit, properly, has not always been observed.

Special and particular verdicts may be found with the understanding that the name of the crime when it has a name, or the facts when it has not, necessary to constitute the crime are fully and explicitly stated. The court cannot supply the facts necessary to constitute the crime. 2 Hawk. P. C. 622; State v. Blue, 84 N. C. 809. "The omission of any fact necessary to constitute the offense is fatal." 3 Whart. Cr. Law, § 3188. Where "intent" is one of the essential ingredients of the crime, it must be found in a special verdict, in order to sustain a judgment. The crime denounced in the case before us for decision, we have seen, includes "intent" as an essential ingredient.

No one, unless acting willfully and maliciously with intent, is guilty of inflicting a wound less than mayhem. In our view, the verdict was defective. It failed to find the criminal intent. It is defective whether construed as a special or a partial verdict. In a very recent case this court held that it was not permissible to go beyond the words used by the jury in matters essential to the finding that a crime has been committed by the accused. State v. Bellard, 50 La. Ann. 594, 23 South. 504, 69 Am. St. Rep. 461. In another, also a case recently decided (State v. Hearsey, 50 La. Ann. 373, 23 South. 372), the court extended the rules of practice much further than there is any necessity of extending in the case here. The rule applying is sustained by a number of well-considered decisions, notably the cases of United States v. Buzzo, 18 Wall. 125, 21 L. Ed. 812, and State v. Burdon, 38 La. Ann. 357. In the former the court said, in construing a special verdict, that the intention is of the essence of the crime, and is not found by the special verdict; no judgment can be entered on the verdict. And, in the latter cited case, the court, in substance, with reference to the finding of a jury, said: "What is not found is not supposed to exist"—citing State v. Ritchie, 3 La. Ann. 512.

There are views not in accord with those we have here expressed. The prosecuting officers have directed our attention to them, and particularly to the case of State v. Mason, 42 La. Ann. 715, 7 South. 668. For the reasons before stated, we cannot adhere to the decision in the Mason Case. We are constrained to adhere to decisions we before cited. We think they are correct in law.

It is therefore ordered and decreed that the judgment appealed from is affirmed.

REX v. MORGAN.

(Court of King's Bench, 1611. 1 Bulst. 84.)

Nota, that before this time, Termin. Trin. 8 Jac., Sir John Egerton, for the King, did prosecute an Enditement of Murder against Edward Morgan of the Inner Temple, Gentlemen, for the murdering of his Sonne, by him killed. * * *

The Counsell for the King did challenge all the Jurors, and being in doubt, of the indifferency of the Jury, and of the sufficiency of their challenge, they doubted, that this Jury was returned on purpose, and by great labouring in the return of them, for to make them favourable, and so for these, and other causes, not named, they left off their proceeding upon the Enditement (for the present) and put in an Appeale prosecuted by the Second Sonne of Sir John Egerton. * * *

Nota, that the Appeale being abated, by the Judgment of the Court as before appears, afterwards the Prosecutor for the King did proceed against Morgan upon the enditement of murder for killing of Egerton, and upon this Enditement, Morgan having pleaded to it, Termin. Pasch. 9 Jac. B. R. came to the Barre, and the Jury appearing, he was tried upon the same Enditement. * * *

Nota, that in this Enditement there are three wounds mentioned. The Jury went together to consider of the Evidence, and of the directions to them given by the Court, they returned, and put their Verdict in writing, in as much, as they did not at all agree in their Verdict. Their Verdict was this, we do finde the Defendant guilty of murder, (but not according to the Enditement) for it is therein mentioned, that he gave him two wounds, the first was mortall, the which was under the right arme, and mentioned in the Enditement, of which mortall wound, he only died, and of no other, and they doe not finde any third wound given, as is mentioned in the Enditement, and that this was done by him, ex malitia sua proecogitata, and so concludes, that if the Court shall adjudge this Fact, to be a killing according to the Enditement, then they do finde him guilty of murder, but not otherwise. The Court did then declare to the Jury, that this their Verdict thus given, is no Verdict at all. All the Jury did agree, that the wound under the right arme was mortall, and that of this wound he died, and that he was killed by Morgan; that this killing was murder, and that two wounds were by him given, one of them onely mortall, and of which he died, so that they finde but two wounds given, and say nothing of the third, there being three wounds laid in the Enditement, and one only to be mortall, of which he died, and this was all the finding of the Jury.

Williams and Croke, Justices. That this is a good finding by the Jury, they having found the death of the party killed, and that he was killed by Morgan, who gave him two wounds, one of them under the right arme, which was mortall, of which he died, and this was murder, this is a good verdict, and by this, they have found the Prisoner guilty of murder.

Flemming, Chief Justice, differed from them in opinion in this, here the Jury do finde two wounds to be only given, and the first of them to be mortall, of which he died, and if this be a dying according to the Enditement, this they leave to the Court, so that they finde this specially as before, so that the Court were divided upon this Verdict, two against one.

Morgan the Prisoner at the Barre perceiving that the Court did not agree, but differed in opinion, moved the Court for to accept of Baile for him. The Court all denyed to accept of Bayle for him, and as for the Verdict thus given by the Jury of this, Curia advisari vult, and so the matter was adjourned until another time, and Morgan the Prisoner was carried away from the Barre, in Custodia.

Nota, that afterwards the last day of Trinity Terme 9. Jac. B. R. Edward Morgan was brought again to the Barre, and being demanded what he had to say for himself, why Judgement and Execution should not be awarded against him, he offered to the Court, the King's gracious Pardon, under the Privy, and the great Seale, and he humbly desired allowance of the same by the Court, the Pardon was received, and openly read, and afterwards the same was allowed of by the Court, with some good advice by them given unto him, and so by the Rule of the Court, he was discharged, set at libertie and suffered ad largum ire.[15]

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[15] Part of this case is omitted.

BURDEN v. STATE.

(Supreme Court of Mississippi, 1908. 45 South. 705.)

Chester Burden was convicted of assault and battery with intent to commit manslaughter, and sentenced to the penitentiary, and he appeals. Reversed for proper sentence.

CALHOON, J. We find no reversible error in this record, except the sentence to the penitentiary. The verdict of the jury, in contemplation of law, was a verdict of assault and battery simply. Ex parte Chester Burden, 92 Miss. 14, 45 South. 1, 131 Am. St. Rep. 511.

Accordingly, the case is reversed and remanded, in order that appellant may be sentenced as for assault and battery.

MAYES, J., dissents.

REX v. LORD FITZWATER.

(Court of King's Bench, 1675. 2 Lev. 139.)

Information in the nature of a quo warranto for fishing in the river Thames in a place extending in B in seven parishes as appears upon the record.[16] After verdict for the defendant it was moved in arrest of judgment. * * * And afterward in Mich. term the verdict was set aside upon affidavits that the jury cast lots for their verdict and gave verdict according to the lot. * * * [17]

GLIDEWELL v. STATE.

(Supreme Court of Tennessee, 1885. 15 Lea, 133.)

WILSON, Special Judge, delivered the opinion of the court.[18] * * * The next contention is that the verdict should have been set aside, and a new trial granted, because, as it is shown by the affidavits of two of the jurors, the jury, in considering of their verdict, differed among themselves as to the time the prisoner should be imprisoned, and therefore it was agreed among them that each juryman should set down the time he was for, and the product of the aggregate divided by twelve was to be accepted and returned as the verdict of the jury, which was done. If the facts were this way, they would clearly, under our authorities, vitiate the verdict, and it should be set aside.

But upon a careful examination of the record we find the facts to be otherwise, even as detailed by the jurors who give their affidavits. Each juror, it seems, did set down or announce the time or number of years he thought the prisoner ought to be confined, and the result of this aggregate divided by twelve was the verdict agreed upon and returned by the jury. But there was no agreement or understanding, expressed or implied, tacit or otherwise, before this aggregation and division were made, that the result should be their verdict; nor was it in any way to bind the assent or influence the judgment of the individual members of the jury.

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[16] Part of this case is omitted.

[17] Accord: White v. State, 37 Tex. Cr. R. 651, 40 S. W. 789 (1897). In Vaise v. De Laval, 1 Term R. 11 (1785), Lord Mansfield refused to receive as evidence affidavits of a juror that the jury had determined their verdict by lot. But see White v. State, 37 Tex. Cr. R. 651, 40 S. W. 789 (1897).

[18] Part of this case is omitted.

And it is the fact of an agreement or understanding, before this method of reaching a result is adopted, or while it is in process of execution, to be bound by its result, and to accept it, that vitiates the verdict. If this be the true test, much less should we be inclined to set aside a verdict, in the absence of an agreement or understanding beforehand to be bound by the result reached under this method, when we can see that the method and its result were not even used as an argument with any member of the jury to secure his acquiescence in the result. No authority we have been able to find, certainly none in this state, holds that a verdict is vitiated simply because the jury put down the time each was for confining the prisoner on trial before them, added all of them together, divided the total by twelve, and adopted, after consultation and agreement, the product as their verdict, when there was no agreement or understanding beforehand to do so, and when the method adopted and its result were not used as an argument to influence an unwilling or hesitant member to acquiesce in it. This is the category in which we find this case. * * *

The judgment of the court below is therefore reversed, and the cause will be remanded for a new trial.[19]

[19] Accord: Thompson's Case, 8 Grat. (Va.) 637 (1851); Cochlin v. People, 93 Ill. 410 (1879).

CHAPTER XIII

NEW TRIAL

REX v. INHABITANTS OF OXFORD.

(Court of King's Bench, 1811. 13 East, 411.)

This indictment, for the nonrepair of a public bridge over the river Cherwell, called Enslow Bridge, within the county of Oxford, was preferred at the assizes for the county of Oxford, and was tried before Lawrence, J., at the last assizes at Oxford, when the defendants were found guilty; the question made at the trial being whether certain persons were bound to the repair ratione tenuræ. And now

Jervis, on behalf of the defendants, prayed the court for a certiorari to remove the indictment and proceedings into this court, for the purpose, as he stated, of moving for a new trial; the verdict being against the evidence and the direction of the learned judge who presided at the trial. He admitted that in case of The King v. Elizabeth Nicoll, 14 East, 211, note, where the proceedings on an indictment at Hick's Hall for a conspiracy were removed by certiorari between verdict and judgment, this court, referring to The King v. Baker, said that they could not give judgment, not being apprised of the circumstances of the offense. But that difficulty will not arise in this case, where the object is to bring the whole evidence in review before the court upon the learned judge's report. It is of great consequence to those concerned that a verdict given against evidence and the direction of the judge should in some mode or other be corrected.

Lord Ellenborough, C. J. It is also of great consequence that we should not, without precedent, and against authority intrude upon all the inferior jurisdictions in the kingdom (for if we do it in one case, there is no reason why we should not be called upon to do it in all), by removing hither their proceedings after verdict and before judgment, for the purpose of examining the evidence on which the verdicts have been obtained. There would be no end of such investigations. But I would not have the notion for a moment entertained that we have the power of entering into the merits of verdicts, and granting new trials in proceedings before inferior jurisdictions.

Bayley, J., assenting, the certiorari was denied.

GRAY v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1882. 101 Pa. 380, 47 Am. Rep. 733.)

PAXSON, J.[1] This cause was argued here as upon a motion for a new trial, and two of the assignments of error are to the refusal of the court to grant it. We ought not to be called upon at this late day to say that it is not within the line of our recognized duties to correct supposed errors in the lower courts in this manner. Nor are capital cases an exception to this rule. We are not jurors, and are not called upon to weigh the evidence even when a human life is at stake, further than to say, when called upon to do so in an orderly manner, whether there is sufficient evidence to submit to the jury upon a particular question of fact. If the jury make a mistake, the remedy is a motion for a new trial in the court below. If a new trial is refused, where upon the evidence it ought to have been granted, and the judgment is affirmed here upon the law of the case, the only remedy is an appeal to the pardoning power. It is foreign to our duties to interfere in such cases, nor do we see that any practical good would result from our assuming such a jurisdiction. It is better for the administration of the criminal law that each department of the government concerned therein should confine itself to those duties which the law has assigned to it, and which long experience has shown to be wise and proper. * * *

The judgment is affirmed.

COMMONWEALTH v. GREEN.

(Supreme Judicial Court of Massachusetts, Suffolk and Nantucket. 1822. 17 Mass. 515.)

PARKER, C. J.[2] The prisoner, having been convicted, by the verdict of a jury, of the crime of murder, at the last term of the court, moved for a new trial, because, as alleged in his motion one Sylvester Stoddard, who had been sworn as a witness on the part of government, and who had testified to the jury, had been convicted of the crime of larceny, in a court having jurisdiction of the offense, within the state of New York, whereby, as is alleged, he was rendered infamous, and for that reason his testimony could not be received in a court of justice in this commonwealth. A copy of the record of that conviction has been produced in support of the motion; and sufficient evidence has been given to satisfy the court, for the purpose of sustaining this motion, that the Sylvester Stoddard, who was sworn and examined on the trial of the prisoner, was the subject of that conviction. It appeared also, that judgment was rendered upon that conviction, and was executed upon the convict, within the public prison of the state of New York.

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[1] Part of this case is omitted.

"The refusal of a motion for a new trial is an error in law only when it is apparent that such refusal amounts to a clear abuse of discretion." Williams, J., in Commonwealth v. Roddy, 184 Pa. 292, 39 Atl. 211 (1898). Cf. People v. Francis, 52 Mich. 575, 18 N. W. 364 (1884); Omeara v. State, 17 Ohio St. 515 (1867); Reinhart v. State, 45 Ind. 147 (1873).

[2] Part of this case is omitted.

It has been argued by the Attorney and Solicitor General, that by law a new trial cannot be granted of a capital felony; and it appears by the English text-books, and by several decisions cited in support of the position, that in cases of felony, a new trial is not usually allowed by the courts of that country. But whatever reasons may exist in that country for this practice, we are unable to discern any sufficient ground for adopting it here.

That a prisoner, who has been tried for a felony, and acquitted, should not be subjected to a second trial for the same offense, seems consistent with the humane principles of the common law, in relation to those whose lives have been once put in jeopardy. But the same humane principles would appear to require that, after a conviction, a prisoner should be indulged with another opportunity to save his life, if anything had occurred upon the trial which rendered doubtful the justice or legality of his conviction. "Nemo bis debet vexari, pro una et eadem causa," is a maxim of justice, as well as of humanity, and was established for the protection of the subject against the oppressions of government. But it does not seem a legitimate consequence of this maxim that one who has been illegally convicted should be prevented from having a second inquiry into his offense, that he may be acquitted, if the law and the evidence will justify an acquittal.

It is true that, in England, the utmost caution is used on capital trials in favor of life; and if an irregularity materially affecting the trial occurs to the injury of the accused, the court usually represents such matter to the crown, and a pardon is generally granted. But it is the right of every subject of that country, and of every citizen of this, to have a fair and legal trial before his peers, the jury; and it is hardly consistent with that right that it should be left to the will or discretion of the judge whether a representation of an actual irregularity shall be made to the pardoning power, or to the discretion of the latter whether that power shall be exercised in favor of a person unlawfully convicted.

Where the error appears of record, in either country, the court will arrest the judgment after a verdict of guilty; and the party may be again indicted, and tried, for the same offense. If the error does not appear of record, but arises from inadvertency of the judge in rejecting or admitting evidence, or from misbehavior of the jury, or other cause which would be good ground for a new trial in civil actions or misdemeanors, justice and consistency of principle would seem to demand that the person convicted should, upon his own motion, have another trial, instead of being obliged to rely upon the disposition of the court to recommend a pardon, or of the executive power to grant it. It is not enough that the life of the accused will generally be safe in the hands of such highly responsible public agents. The right of the subject to be tried by his peers, according to the forms, as well as principles, of law, is the only certain security that at all times and under all circumstances that protection which the Constitution extends to all will be effectually enjoyed.

Nor is it for the public safety and interest that new trials should be refused in such cases; for it must be obvious that in most cases of irregularity, which would be a good cause for another trial, if in the power of the court to grant it, a pardon, upon the representation of the court, would be thought to follow of course, and thus, in many cases, public justice might be prevented on account of defect in form, or some irregularity, not affecting the merits of the case, which mischief might be avoided by another trial.

For these reasons we think there is a power in this court to grant a new trial on the motion of one convicted of capital offense, sufficient cause being shown therefor, notwithstanding the English courts are supposed not to exercise such authority; and if this opinion needs support, the case of John Fries, who, after conviction of treason, was tried a second time, and the case in South Carolina, cited at the bar from Bay's Reports, are sufficient for this purpose. In the case of United States v. Fries, 3 Dall. (Pa.) 515, Fed. Cas. No. 5,126, 1 L. Ed. 701, Mr. Rawle, the district attorney, admitted the power of the court to grant a new trial, and argued only against the propriety of exercising the power in that case. Judge Iredell expressly admitted the power, and Judge Peters, who was against a new trial, although he yielded to the Circuit Judge, did not deny the authority of the court to grant it. In a late case, also, in New York, People v. Goodwin, 18 Johns. 187, 9 Am. Dec. 203, which was a case of felony, it was decided that the cause might be taken from the jury, and a new trial ordered.

Assuming, then, that this court has the power to grant a new trial in cases like the one before us, we are to inquire whether the facts upon which the present motion is founded are of a nature to require the exercise of that power, and, if not, whether, in the discretion of the court, it ought now to be exercised. * * *

It being the rule, then, that objections to the competency of a witness, founded on conviction of crime, must be made at the trial, and when the witness is offered to be sworn, it follows that, because a witness was sworn in the cause, who is since found to have been so convicted, the trial was not for that cause erroneous or irregular, and a new trial on that account cannot be demanded as a right. Whether this fact furnishes a sufficient ground for the discretion of the court to grant a new trial depends upon other circumstances, which will hereafter be stated. The trial cannot be impeached because a witness, against whom there was no legal objection at the time, is afterwards discovered to have been liable to an exception which, if known, would have excluded his testimony. * * *

Certainly cases may arise when the exercise of this power in the court would be salutary and wise; but every case of discretion must depend upon its circumstances, and be judged of with due regard to the rights of the public, as well as the interest of the prisoner. In cases which affect life, duty as well as inclination would insure the most favorable consideration of all circumstances which might have a tendency to protect innocence from punishment, and even to extend to the guilty all the legal advantages of a trial. But when there has been a trial, which the court are satisfied was fair and impartial, and in which all the legal rights of the party accused were observed, and a new trial is sought for, the court are bound to look into the evidence upon which the verdict was founded, in order that they may ascertain whether the cause suggested in support of the motion is such as would or ought to produce a different result in the minds of another intelligent jury. It is true, it cannot be known what effect may be produced upon other men's minds by any specific kind or degree of evidence, and with that, in the course of the trial, the court have no concern; but on a motion to their discretion they must necessarily revise the evidence, and must judge for themselves of the probable bearing of the circumstances relied on to support the motion.

Having decided that to grant new trials in capital cases is within the power of the court, and that the exercise of this power, where there has been no error on the trial, is discretionary, if every suggestion should be listened to, without regard to the merits of the case, or the just bearing of the fact suggested, it is certain that the course of public justice would be much obstructed, and that the punishment of crimes would often be evaded. It is a power to be used sparingly for the protection of innocence, not to screen the guilty.

Now, in the case before us, the only advantage the prisoner would have on another trial, which he had not before, would be to show that Stoddard, one of the witnesses who testified against him, was not deserving of credit, because he had been convicted of larceny in New York. If this witness had gone to the jury wholly unimpeached, and his testimony had been material and uncorroborated, the case would be a strong one for the exercise of the discretion of the court in granting another trial.

But this witness was impeached at the trial, by the evidence of two convictions of larceny within the commonwealth; and it was known to the jury that he had but just left the public prison, under a pardon granted by the executive, for the sole purpose of rendering him a competent witness. Surely evidence of another conviction of a similar offense in another state, of which he had not been pardoned, would have added nothing to the weight of evidence against his credibility. He was considered as a degraded person, both by the court and jury; and in the charge to the latter by the court they were expressly told that, unless they found his testimony corroborated by unimpeached witnesses, he ought not to be believed. The same observations applied to another witness, who appeared under similar circumstances.

In the opinion of the court, there was sufficient evidence to justify the verdict without the testimony of either of those men. * * *

Under these circumstances, to grant a new trial would be only to prolong the suspense and increase the anxiety of the prisoner, without any final advantage to him; and we do not feel authorized to surrender the principles of justice to feelings of compassion or sympathy.

Motion overruled.[3]

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[3] Compare State v. David, 14 S. C. 428 (1881).

"Besides writs of error, motions for new trials are permitted in some cases of misdemeanor, namely, cases of misdemeanors tried before the Queen's Bench Division in the exercise of its original jurisdiction, or sent down by that division to be tried at the Assizes on the nisi prius side. If a misdemeanor is tried before commissioners of oyer and terminer at the Assizes or at the Quarter Sessions, the Queen's Bench Division will not after verdict remove the case by certiorari, with a view to granting a new trial. If the parties wish to have the possibility of applying for a new trial, or to have a special jury, their course is to apply for a certiorari before the case comes on to be tried. If the court is satisfied that questions of difficulty are likely to arise they will issue a certiorari, and either have the case tried before the Queen's Bench Division at Westminster, or send it down to be tried as a nisi prius record at the Assizes or in the city of London. When the case is so tried a new trial may be moved for on the ground of misdirection, that the verdict was against the evidence, or on other grounds on which new trials are moved for in civil cases. According to Chitty, the first instance of such a new trial was in the year 1655. One case only has occurred in which a new trial was granted for felony, and that case was afterwards disapproved of and not followed by the Judicial Committee of the Privy Council in R. v. Bertrand, L. R. 1 P. C. 520. It is very remarkable that in the argument upon R. v. Scaife, no notice was taken of the novelty of the proceeding." Stephen's Hist. Crim. Law, p. 310.

"It was contended on behalf of the prosecutor that, as two of the defendants had been acquitted, the record could not be sent down again to another trial without putting their guilt or innocence again into a state of inquiry, and that, inasmuch as defendants who have been acquitted in criminal cases cannot be tried a second time, the necessary consequence was that in this case we could not grant a new trial, even though we were clearly of opinion that the other two defendants had been improperly convicted. If such were the rule, it would bear extremely hard on particular persons accused; for then, however unjust the verdict against some of the defendants might appear to be, and though it should turn out beyond all contradiction that the verdict had been obtained by the grossest perjury, the guilt of those defendants must necessarily stand on record, provided one defendant, perhaps included in the indictment for the very purpose, were acquitted. But I think that the rule was correctly stated by the counsel for the defendants that in granting new trials the court know no limitations (except in some excepted cases), but they will either grant or refuse a new trial as it will tend to the advancement of justice. In one class of offenses, indeed, those greater than misdemeanors, no new trial can be granted at all. But in misdemeanors there is no authority to shew that we cannot grant a new trial in order that the guilt or innocence of those who have been convicted may be again examined into." Kenyon, C. J., in Rex v. Mawbey, 6 Term R. 638 (1796).

STATE v. EAVES.

(Supreme Court of Georgia, 1901. 113 Ga. 749, 39 S. E. 318.)

SIMMONS, C. J.[4] * * * From the indictment it may be ascertained that the accused is charged with the violation of a certain penal statute. The accused contended that this act was no longer in force in Bartow county, having been superseded by another act. He sought to make the question in the lower court by requesting the judge to instruct the jury that a conviction could not be had under the indictment. In the motion for new trial complaint is made that the judge refused to so charge. The motion also sets up that the verdict is contrary to law, in that the indictment was based upon this inoperative statute. The question was not raised by demurrer to the indictment, the allegations of which were sufficiently established by the evidence. There was no motion to quash the indictment. The question was never properly raised. If the plaintiff in error was indicted under a law no longer in force, and the indictment is fatally defective, he does not want a new trial under that indictment. "In such a case the remedy is by general demurrer before a trial on the merits, or by motion in arrest after verdict." Roberts v. Keeler, 111 Ga. 186, 36 S. E. 617.

After going to trial upon the merits without objection to the indictment, the accused could not properly ask the direction of a verdict in his favor because of the insufficiency of the indictment. See Bray v. Railroad Co., 113 Ga. 308, 38 S. E. 849; Strouse v. Kelly, 113 Ga. 575, 38 S. E. 957. Nor can this point be made in a ground of a motion for a new trial complaining that the verdict is contrary to law and the evidence. See Phillips v. Railway Co., 112 Ga. 197, 37 S. E. 418; Roberts v. Keeler, supra. In the absence of objection to such an indictment, a conviction is authorized if the evidence sustains the allegations of the indictment as laid. Without regard, therefore, to the merits of the point sought to be raised, we must affirm the overruling of these grounds of the motion for new trial.

The verdict was authorized by the evidence. Judgment affirmed. Cross-bill dismissed. All the Justices concurring.[5]

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[4] Part of this case is omitted.

[5] Accord: State v. Taylor, 37 La. Ann. 40 (1885).

BEPLEY v. STATE.

(Supreme Court of Indiana, 1853. 4 Ind. 264, 58 Am. Dec. 628.)

STUART, J.[6] This was a prosecution for a nuisance, under the seventeenth section of the act of March, 1853, regulating the retail of spirituous liquors. Trial by jury. Verdict and judgment for the state. * * *

There is a technical point, well settled in the books, but often overlooked in practice, which would restrain us from disturbing the verdict, if we were otherwise so disposed. The defendant moved first in arrest of judgment. According to the authorities he could not afterwards take the opinion of the court below on the sufficiency of the evidence, by a motion for a new trial, unless he had brought himself within some of the recognized exceptions, which he has not done. In the order in which they were made the one motion was fatal to the other. Rogers v. Maxwell, 4 Ind. 243; .Mason v. Palmerton, 2 Ind. 117. * * *

PER CURIAM. The judgment is affirmed, with costs.[7]

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[6] Part of this case is omitted.

[7] Accord: Rex v. White, 1 Burr. 333 (1757); Respublica v. Lacaze, 2 Dall. (Pa.) 118, 1 L. Ed. 313 (1791); McComas v. State, 11 Mo. 116 (1847).

"A new trial must be applied for within two days after the conviction; but, for good cause shown, the court, in cases of felony, may allow the application to be made at any time before the adjournment of the term at which the conviction was had. When the court adjourns before the expiration of two days from the conviction, the motion shall be made before the adjournment." Code Cr. Proc. Tex. 1895, art. 819; Pasch. Dig. art. 3136.

See, also, Lawson v. State, 71 Ind. 296 (1880); State v. Alphin, 81 N. C. 566 (1879); Ross v. State, 65 Ga. 127 (1880).

CHAPTER XIV

ARREST OF JUDGMENT

STATE v. SUTCLIFFE.

(Court of Appeals of South Carolina, 1850. 4 Strob. 372.)

The prisoner was convicted at the May term, 1849, and an appeal was taken in his behalf, which, after being docketed, was abandoned. On motion being made for judgment, the prisoner insisted that this court had no further jurisdiction in the matter, but that he must be remanded to await the judgment of the circuit court at its next term; and, secondly, he prayed the benefit of clergy.[1]

WARDLAW, J. * * * The prayer for benefit of clergy is then allowed, and the sentence for felony within the benefit will now be pronounced. As that has been, by our statutes, made fine and imprisonment, the case of the prisoner is just as if he had been indicted and convicted of a misdemeanor, except that, under the right of challenge, he has enjoyed privileges which one accused of a misdemeanor is not entitled to, and that for a second offense, he may hereafter lose the benefit now allowed to him.

RICHARDSON, EVANS, and FROST, JJ., concurred. WITHERS, J., absent, from indisposition.

The prayer for benefit of clergy was allowed, and the sentence for felony within the benefit was pronounced by the court.

STATE v. ARDEN.

(Court of General Sessions of South Carolina, 1795. 1 Bay, 487.)

The prisoner was indicted, together with one Campbell, for the murder of a Spanish seaman by the name of Jewets, and, at her particular request, was tried separately. Campbell was convicted of manslaughter, but the prisoner of murder. On the adjournment day of the sessions, when she was brought up for sentence, [2]

THE COURT (present BURKE, GRIMKE, WATIES, and BAY, Justices) unanimous that the motion in arrest of judgment should be overruled, as the prisoner had been indicted as a principal in both counts of the indictment, and the jury were to judge of the malicious intent, of the degrees of guilt in the parties, and to apply the evidence to the different counts as they thought proper.

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[1] Part of this case is omitted.

[2] The arguments of counsel are omitted.

The prisoner was then asked if she had anything to offer why sentence of death should not be pronounced against her. Upon which she pleaded pregnancy. Whereupon she was remanded to gaol, and the sheriff was directed to summon a jury of matrons, de ventre inspiciendo. The court then adjourned from day to day, till the inquisition was found. It was then returned by the sheriff into court, under the hands and seals of twelve matrons, in which they certified that they had examined the prisoner, and found that she was not pregnant. The prisoner was then brought up, and received sentence of death, and was afterwards executed pursuant to the sentence.[3]

STATE v. VANN.

(Supreme Court of North Carolina, 1881. 84 N. C. 722.)

Proceeding in a criminal action at Fall term, 1880, of Hertford superior court, before Schenck, J.

The prisoner being brought to the bar of the court for judgment pursuant to the decision of this court, reported in 82 N. C. 631, was asked if he had anything further to say than he had already said why sentence of death should not be pronounced upon him, and in answer thereto (through his counsel) suggested that the prisoner since his conviction had become insane, and in support thereof produced affidavits. Thereupon he demanded a jury trial of the question of his insanity, and asked for a continuance of the cause until the next term to prepare for trial. The court held that he was entitled to a jury to inquire into the fact, and, if it should be found favorable to the prisoner, the judgment must be suspended until his sanity was restored, and thereupon remanded him to prison and continued the case that the issue might be tried by a jury. From this ruling the solicitor for the state appealed.

Smith, C. J.[4] * * * We concur entirely with the ruling of his honor that judgment must be suspended if the prisoner has become insane since his trial, and is still insane, until he recovers his reason, and that an issue to be submitted to the jury is the proper mode of ascertaining the truth of his allegation. The principle is thus laid down by Lord Hale: "If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrensy, but be remitted to prison until that incapacity be removed. * * * And if such person after his plea and before his trial become of nonsane memory, he shall not be tried; or if after his trial he become of nonsane memory, he shall not receive judgment; or if after judgment he become of nonsane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution." Hale, P. C. 34. The same language is used by Blackstone, and he adds: "For as is observed by Sir Edward Coke, the execution of an offender is for example, ut pœna ad paucos, metus ad omnes perveniat; but so it is not when a madman is executed, but should be a miserable spectacle, both against law and of extreme inhumanity and cruelty, and can be no example to others. But if there be any doubt whether the party be compos or not, this shall be tried by a jury." 4 Bl. Comm. 25. The same rule is laid down by the elementary writers and may be found in adjudged cases. Shel. on Lunacy, 467; 1 Bish. Cr. Law, § 487; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216.

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[3] In England pregnancy is not a cause for arrest of judgment, but can only be pleaded in stay of execution. Chitty, Cr. Law, 759.

[4] Part of this case is omitted.

But, for the reasons stated, the appeal was improvidently taken and must be dismissed.

Per Curiam. Appeal dismissed.[5]

STATE v. CARVER.

(Supreme Judicial Court of Maine, 1862. 49 Me. 588, 77 Am. Dec. 275.)

Davis, J.[6] This was an indictment against Carver and Lunt, as principals, and also against Wilson and Clapp, as accessories before the fact. The first two, only, appear to have been arrested. Upon arraignment they pleaded guilty, and afterwards their counsel filed a motion in arrest of judgment. This was overruled by the court, and the case comes before us on exceptions.

We see no objection to the indictment itself which can avail the defendants, especially after the general plea of "guilty." The count against them as principals is sufficient in all respects; and, without intending to intimate that Wilson and Clapp may not be held upon the same indictment, we are clearly of the opinion that judgment may now be entered upon the pleas of the other defendants.

Another ground of the motion in arrest is that the grand jury, by whom the indictment was found, were "not legally drawn, and had no power to act in the premises." This allegation is one of fact, as well as of law. The facts do not necessarily appear of record, though in this case the return upon one of the venires does not show that one of the grand jurors had no authority to act as such. State v. Clough, 49 Me. 573. But neither the venire, nor the return, constitutes any part of the record of this particular case. The proceedings of the departments of the government, of counties and towns, and officers of counties and towns, are all brought into requisition in order to constitute the court. Some of these are matters of record in the court, of which judicial notice will be taken, without other proof. But, if pleaded, they are to be pleaded as matters of fact, however proved. They are proceedings preliminary to the organization of the court, and not proceedings of the court after it is organized. A motion in arrest of judgment in any particular case does not necessarily bring them before us. They cannot be brought before us except by being pleaded specially; and they cannot be pleaded in such a motion with any more propriety than any other extrinsic facts.

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[5] "We do not understand that any change in the condition of the prisoner was shown to have taken place since the impaneling of the jury. It was then, in effect, requiring the court to arrest or stay the judgment, for the same reason which had been unsuccessfully urged before the jury in defense of the criminal charge. We think the circuit court properly refused to entertain the motion." Goldthwaite, J., in State v. Brinyea, 5 Ala. 243 (1843).

[6] Part of this case is omitted.

A motion in arrest of judgment, in many of the states, is substantially a motion for a new trial, often for reasons entirely extrinsic of the record. But, at common law, "judgment can never be arrested but for that which appears upon the record itself." Peachy v. Harrison, 1 Ld. Raym. 232, 1 Salk. 77; Sutton v. Bishop, 4 Burr. 2283, 2287. The same rule prevails in this country. Such a motion can only be made "on account of some intrinsic defect, apparent on the face of the record, which would render the judgment in the case erroneous." Howe's Practice, 533; Bedell v. Stevens, 8 Fost. (N. H.) 118; Burnett v. Ballund, 2 Nott & McC. (S. C.) 435; State v. Bangor, 38 Me. 592, and cases there cited.

That the "record" referred to in these decisions is the record of the particular case under consideration was expressly held in the case last cited. It was alleged in the motion that another indictment for the same offense was found at the same term of the court. But it was decided that such a motion would not be entertained where proof was required to sustain it, though the proof was a matter of record in the same court.

A motion in arrest presents only the sufficiency of the indictment. State v. Nixon, 8 Vt. 70. It is equivalent to a demurrer, and can be sustained only when all that is alleged in the indictment may be true, and yet the person convicted not have committed any offense. State v. Hobbs, 39 Me. 212, and cases cited. And, even for defects which would be fatal to an indictment upon demurrer, if they are such as are aided by a verdict, judgment will not be arrested after conviction. Commonwealth v. Tuck, 20 Pick. (Mass.) 356.

Nor will judgment be arrested for anything that could have been pleaded in abatement.

By pleading generally to the indictment the defendant admits its genuineness, and waives all matters that should have been pleaded in abatement. The decisions to this point, both in England and in this country, are numerous. But it is urged that such cases are to be distinguished from the one at bar, because here the defendants deny that there is any indictment, on the ground that there was no legal grand jury.

The question here presented has often been raised in this country, and it has uniformly been held that it is too late, after a verdict, to object to the competency of the grand jurors by whom the indictment was found, or to the mode of summoning or impaneling them. All such objections must be pleaded in abatement. The question is discussed at length in the case of People v. Robinson, 2 Parker, Cr. R. (N. Y.) 235, where many of the American cases are collected. The Attorney General, in the case before us, has cited other cases where the same doctrine is held. And we are not aware of any cases where it has been called in question.

The exceptions must be overruled.[7]

TENNEY, C. J., and RICE, MAY, GOODENOW, and KENT, JJ., concurred.

STATE v. HOLLEY.

(Constitutional Court of South Carolina, 1800. 1 Brev. 35.)

Motion in arrest of judgment. The prisoner had been tried and convicted in the court of sessions of Kershaw district, on an indictment for forgery. * * *

The counsel for the prisoner urged three principal grounds of exception to the indictment, in support of the motion in arrest of judgment. * * *

Thirdly. That the indictment, in the concluding part thereof. charges the offense as having been committed against the form of the statute in such case made and provided, etc.; whereas, the same ought to have been charged as having been against the act of assembly of this state, in such case made and provided. * * *

TREZEVANT, J.[8] I am of opinion that the judgment ought to be arrested in this case, because of the conclusion of the indictment being against the form of the statute in such case made and provided, and made of force in this state, instead of charging the offense to have been committed against the act of the General Assembly. Although the title of our act of assembly speaks of making the British statute of force in this country, yet there is no enacting clause for that purpose. (See P. L. 147.) The act itself creates the offense in the language of the British statute; but this can give no more support to this mode of concluding the indictment than it would have done if the British statute had never been mentioned in the title of the act. The style of this act differs very widely from that of the act by which most of the British statutes were adopted, and which are now of force in this state. This ground being fatal to the indictment, it is unnecessary to give any opinion upon the others.

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[7] Accord: Irregularity in drawing grand jury. Peter v. State, 11 Tex. 762 (1854). Misbehavior of judge in communicating with the jury. People v. Kelly, 94 N. Y. 526 (1884). Illegal admission of evidence. State v. Snow, 74 Me. 354 (1883). Misnomer in the indictment. State v. Thompson, Cheves (S. C.) 31 (1839). Lack of verification of information by oath. State v. Patton, 94 Mo. App. 32, 67 S. W. 970 (1902). Incompetence of juror. State v. Davis, 126 N. C. 1007, 35 S. E. 464 (1900).

"On a motion in arrest of judgment, * * * defects in the caption, or even the omission of the caption, cannot be noticed." Aldis, J., in State v. Thibeau, 30 Vt. 104 (1858).

[8] Part of this case is omitted.

But the defendant's counsel also moves to have him discharged. In my opinion he ought not to be discharged, but ought to be indicted again. Vaux's Case, 4 Rep. 45. The indictment being insufficient, his life was never in jeopardy.

The judgment was arrested; but the prisoner was remanded to the gaol of Kershaw district, and ordered to be indicted again. Before the next court, however, he made his escape, and left the state.

LACEFIELD v. STATE.

(Supreme Court of Arkansas, 1879. 34 Ark. 275, 36 Am. Rep. 8.)

HARRISON, J.[9] * * * The record states that the arraignment of the defendant was waived by him, but contains no entry of a plea to the indictment, though the trial was had, as if the plea of not guilty had been entered.

It was certainly very irregular to proceed to trial without a plea—there was no issue and nothing to try. It was an error for which the judgment should have been arrested. 1 Arch. Crim. Prac. and Plead. 178–31; 3 Whar. Crim. Law, § 3043; State v. Fort, 1 Car. L. Rep. 510; Cannon v. State, 5 Tex. App. 34; Bush v. State, 5 Tex. App. 64; State v. Matthews, 20 Mo. 55.

The judgment is reversed, and the cause remanded, with instructions to require the defendant to plead to the indictment, and to be proceeded in according to law.[10]

[9] Part of this case is omitted.

[10] Accord: Douglass v. State, 3 Wis. 820 (1854). Where indictment charges no offense of which the trial court has jurisdiction (Truitt v. People, 88 Ill. 518 [1878]), or fails to state the county in which the crime was committed (Searcy v. State, 4 Tex. 450 [1849]).

Contra: People v. Osterhaut, 34 Hun (N. Y.) 260 (1884). Under statute. State v. Cassady, 12 Kan. 550 (1874).

STATE v. RYAN.

(Supreme Court of Minnesota, 1868. 13 Minn. 370 [Gil. 343].)

Wilson, C. J.[11] * * * The jury, after hearing the evidence and charge of the court, returned this verdict: "We, the jury in the case of the state of Minnesota against John Ryan, do find a verdict of murder in the first degree."

The defendant's counsel thereupon moved the court for a new trial, and in arrest of judgment, which motion was denied, and, judgment having been pronounced and rendered on the verdict, the defendant removed the cause into this court by appeal. * * *

The sixth objection in the defendant's brief, that the record does not show that the officer attending the jury on their retirement was sworn, may be considered with his seventh objection, that record does not show that the defendant was present in court after his arraignment until he was called for sentence. It was on the trial in this court admitted and stipulated by defendant's counsel, as a matter of fact, that the defendant was at the time of his arraignment and during the whole trial, and at the rendition of the verdict, and subsequent proceedings, personally present in court. But this we think is not material. The record shows that defendant "was arraigned, and pleaded not guilty to the charges." There was no "case" or bill of exceptions made, and therefore we can only inquire whether there are errors apparent on the record. It showing that the court had acquired jurisdiction, all acts during the course of the trial are presumed to have been rightly and regularly done, and its silence, here complained of, is not ground for reversing the judgment; the presumption being that the court required the officer to be sworn, and the defendant to be present in court, as the law requires. If there was any error in fact. it is for the defendant to make it appear by a "case" or bill of exceptions. Stephens v. People, 19 N. Y. 549; McKinney v. People, 2 Gilman (Ill.) 540, 43 Am. Dec. 65; Pate v. People, 3 Gilman (Ill.) 644.

As to the defendant's ninth point, that the jurors were irregularly summoned after the regular panel was exhausted, it does not appear from the record or otherwise that there is any foundation, as a matter of fact, for the objection, and we therefore do not consider it.

Judgment affirmed.[12]

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[11] Part of this case is omitted.

[12] See, also, Ford v. State, 112 Ind. 373, 14 N. E. 241 (1887).

"It is settled by the decisions in this state that for mere defects or uncertainties in criminal pleading a motion in arrest will not be sustained, although such defects or uncertainties might be fatal on a motion to quash." Monks, J., in Campton v. State, 140 Ind. 444, 39 N. E. 916 (1895).

Statutes exist very generally limiting the scope of the motion in arrest of judgment. See Young v. People, 193 Ill. 236, 61 N. E. 1104 (1901); Terrell v. State, 41 Tex. 464 (1874); Commonwealth v. Brown, 150 Mass. 334, 23 N. E. 98 (1890); State v. Goldman, 65 N. J. Law, 394, 47 Atl. 641 (1900).

STATE v. LOHMDN.

(Court of Appeals of South Carolina, 1836. 3 Hill, 67.)

Before Mr. Justice Bay, at Charleston, October term, 1835.

Per Curiam. No judgment can be given on the verdict, for it does not find the facts charged in the indictment of giving and delivering liquor to a slave named Sam, the property of Jacob F. Mintzing, but merely the "giving and delivering liquor to a slave." This is not a conviction of the offense charged.

Motion in arrest of judgment granted.[13]

REX v. ROBINSON.

(Court of King's Bench, 1759. 2 Burr. 799.)

This was a motion in arrest of judgment, upon an indictment against the defendant for refusing to obey an order of the general quarter sessions for the county of Stafford, made upon him for his keeping and maintaining James and Peter Robinson, his two infant grandchildren. * * *

The indictment was found at a quarter sessions holden the 12th of July, 31 Geo. II. The defendant had been convicted upon it; and judgment signed as post. pa. 801.

On Monday, 5th February, 1759, Mr. Morton moved in arrest of judgment. * * *

But it being litigated by the other side, previously to their showing cause, "Whether the motion in arrest of judgment was made within time;"

The secondary certified (on Thursday the 3d of May last). And

The Court then held (notwithstanding the case in 1 Salk. 78, The Queen v. Darby, which seems contrary), "That a motion in arrest of judgment may be made (on the crown side) at any time before sentence pronounced." For that the judgment signed in the office is only an interlocutory judgment; and the award "quod capiatur" is only to bring the defendant in, to receive the final judgment or sentence of the court; but is not the final judgment itself. * * * [14]

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[13] Accord: Manigault v. State, 53 Ga. 113 (1874). See, also, Slaughter v. State, 24 Tex. 410 (1859); State v. McCormick, 84 Me. 566, 24 Atl. 938 (1892). Cf. State v. Snow, 74 Me. 354 (1883).

[14] Part of this case is omitted.

CHAPTER XV

JUDGMENT, SENTENCE, AND EXECUTION

If the defendant be in custody, or the crime be capital, he will of course be remanded to prison in the interval between conviction and sentence, if any be allowed to transpire. But if the cause of prosecution be a mere misdemeanor, and he be found guilty in his absence, * * * a capias is awarded and issued to bring him in to receive his judgment, and if he absconds he may be prosecuted, even to outlawry. In case of a conviction for a misdemeanor, if the defendant be present, he will of course be committed during the interval, unless the prosecutor will consent to his liberation on his recognizance to appear and receive judgment.

1 Chit. Cr. Law, 664.

The sentence in capital cases is usually given immediately after conviction, but the court may adjourn to another day and then give judgment.

Id. 699.

McCUE v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1875. 78 Pa. 185, 21 Am. Rep. 7.)

Error to the court of oyer and terminer of Lycoming county; of January term, 1875, No. 51.

On the 25th of November, 1874, a true bill was found against Barney McCue, for the murder of John Dieter. On the 27th of November the defendant, being arraigned, pleaded "Not guilty," and the same day the trial commenced, before Gamble, P. J., and his associates, judges of the court of oyer and terminer of Lycoming county. * * *

On the 1st of December the jury found the defendant "guilty of murder in the first degree."

The record then has this entry:

"And now, December 6, 1874, prisoner, Barney McCue, brought into open court, and the sentence of the court is: That you, Barney McCue, prisoner at the bar, be taken from hence to the jail of the county of Lycoming, from whence you came, and from thence to the place of execution within the walls of said jail, and that you be there hanged." * * *

Chief Justice AGNEW delivered the opinion of the court.[1] * * *

But there is one error for which the sentence of the court must be reversed. It does not appear from the record that the prisoner was asked, before sentence, why sentence of death should not be pronounced upon him. This is a fatal error, and affects the merits of the case. It is necessary to ask the prisoner this, that he may have an opportunity, before the penalty of death be visited upon him, to plead in bar of the sentence any matter sufficient to prevent its execution. He may have found out some good reason why the trial was not legal, or he may plead a pardon, or supervening insanity. The question, and the answer that he hath nothing to say other than that which he hath before said, or this in substance, must appear in the record before the sentence can be pronounced. Prine v. Commonwealth, 18 Pa. 104; Dougherty v. Commonwealth, 69 Pa. 291. In this case the question may have been asked in fact; but, as it does not appear in the record, and is a matter of substance, we must treat it as not having been done. In all high felonies, and especially in cases of murder, the presiding judge should see that the record is made up properly, before the term is over.

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[1] Part of this case is omitted.

The sentence will be reversed, in order that the case may be sent back, and an opportunity afforded to the prisoner to plead in bar of it; but this error will not reverse the trial and conviction. Jewell v. Commonwealth, 22 Pa. 94, 102. * * *[2]

REX v. CATTERALL.

(Court of King's Bench, 1731. Fitzgibbons, 266.)

Upon the Return of a Habeas Corpus, the Commitment was by Justices of the Peace (authorized for that Purpose by Act of Parliament) for refusing to account for a Toll by him received, and until he do account, and pay what shall be due to the Proprietors of the said Toll: Et Per Cur', The Commitment is illegal, for no certain Sum is thereby appointed to be paid, and then the Defendant may remain in Prison for Life: It was then moved to amend the Commitment: Sed Per Cur', That cannot be after the Return filed; and the Defendant was discharged.[3]

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[2] Accord: In treason. Rex v. Speke, 3 Salk. 358 (1691). In capital cases, generally. State v. Ikenor, 107 La. 480, 32 South. 74 (1902); Territory v. Herrera, 11 N. M. 129, 66 Pac. 523 (1901); Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377 (1891). Contra: Gannon v. People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147 (1889); Warner v. State, 56 N. J. Law, 686, 29 Atl. 505, 44 Am. St. Rep. 415 (1894). In some jurisdictions the allocutus is necessary, even in felonies less than capital. Crocker v. State, 47 Ala. 53 (1872); People v. Jung, 70 Cal. 469, 11 Pac. 755 (1886).

[3] Compare Brownbridge v. People, 38 Mich. 751 (1878); People v. Degnen, 54 Barb. (N. Y.) 105 (1869); People v. Hughes, 29 Cal. 257 (1865).

DRIGGERS v. STATE.

(Supreme Court of Alabama, 1899. 123 Ala. 46, 26 South. 512.)

Ed Driggers was convicted of carrying concealed weapons, and appeals. * * *

The judgment entry, after reciting that the defendant pleaded not guilty, and the return of a verdict by the jury of guilty as charged in the indictment, in which there was assessed a fine of $100, then recites: "And the defendant not paying the fine and costs in this case, or confessing judgment for the same, it is ordered by the court that in lieu of the fine not being paid, that the defendant, Ed Driggers, be taken from the bar of this court to the county jail of Wilcox county, there to be detained by the sheriff of Wilcox county, in his custody, until called for by the person having charge of the Wilcox county convicts sentenced to hard labor; and that he perform hard labor for Wilcox county for and during the period of thirty days, as a punishment of this offense," etc.

TYSON, J.[4] The judgment entry in all criminal cases where there is conviction should recite in express words that the defendant is adjudged guilty by the court as found by the jury. There should always be the judgment of the court upon his guilt. In many cases the judgment entries in this respect are faulty, and more attention should be paid by the clerks and judges of nisi prius courts to this important feature. The essential requisites which such judgment entries should contain have been so often pointed out and suggested by this court that it would seem that every clerk and judge in the state would know what they are. And it would seem that a compliance with these suggestions is a matter so simple that all errors in this respect could easily be avoided. Besides, it is a matter of too much importance, and a duty too clearly imposed by law, that the mistake should so frequently occur. It can be accounted for upon no other theory than that the clerk who writes the minute entry is either incompetent or very careless in the discharge of his duties, and the presiding judge fails to read or have the minutes read as he is required by the statute to do. In the case before us the language employed in the minute entry is barely sufficient to uphold the conviction, but under the liberal construction given to words of similar import in the case of Wilkinson v. State, 106 Ala. 28, 17 South. 458, we hold that enough is expressed to show that the judgment of the court was invoked and pronounced upon the guilt of the defendant. * * *

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[4] Part of the case only is reprinted.

WILSON v. STATE.

(Supreme Court of Indiana, 1867. 28 Ind. 393.)

FRAZER, C. J. Indictment for grand larceny. Verdict guilty, assigning the punishment at two years in the state prison, a fine of one dollar, and that the defendant be disfranchised for the term of five years. Judgment, two years in the state prison at hard labor, fine one dollar, and that the defendant be disfranchised and rendered incapable of holding any office of trust or profit for five years. There is no argument for the state.

The judgment as to hard labor is not objectionable, though it was unnecessary. It is by law the fate of all who are imprisoned in the penitentiaries, and a judgment to that effect certainly can do no harm. 1 Gav. & H. Rev. St. 1870, p. 468, § 15. But there was no verdict authorizing a judgment rendering the prisoner incapable of holding office. The jury must assess the punishment, and the judgment must be according to the verdict. 2 Gav. & H. Rev. St. 1870, p. 419, §§ 116, 117. The verdict itself was defective in not assessing a penalty of the sort, and the jury should have been, on that account, sent back for further deliberation, that they might have corrected it. Id. p. 442, § 19.

There was a serious defect in the evidence. The property was laid to be in Lewis Vance and Henry H. Armstrong. The whole proof of that averment was that it was part of the rigging of the steamer Jacob Strader, owned by R. & E. Neal, and that Vance and Armstrong had said to the owners that they would see that the boat "was taken care of while there, and did so."

The judgment is reversed, and the cause remanded for a new trial.[5]

KIDD v. TERRITORY.

(Supreme Court of Oklahoma, 1900. 9 Okl. 450, 60 Pac. 114.)

IRWIN, J.[6] In this case there are 19 assignments of error, but we think it only necessary to refer to one. That is the error assigned that the court, in pronouncing sentence, found the defendant guilty of a different and higher degree of offense than that authorized by the verdict of the jury. A reference to the verdict of the jury will be found in the record. The verdict reads as follows: "We, the jury duly selected, impaneled, and sworn in the above-entitled cause, find the defendant guilty of assault and battery. F. L. Boling, Foreman."

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[5] Accord: Rivers v. State, 10 Tex. App. 177 (1881). Where the court imposed a lighter sentence than that fixed by the verdict. Cole v. People, 84 Ill. 216 (1876).

[6] Part of this case is omitted.

A reference to the sentence of the court will show the following: "October 22, 1898. 12th Judicial Day. Criminal Cause #711. Territory of Oklahoma v. James W. Kidd. Judgment and Sentence. Comes now defendant into open court for judgment and sentence on the verdict of guilty heretofore rendered in said cause; and now, defendant giving no good reason why the judgment and sentence of the court should not at this time be pronounced upon him, on the verdict herein, the court finds that the said defendant is, on the verdict herein, guilty of assault with intent to kill. It is therefore considered, ordered, and adjudged that the defendant, James W. Kidd, be, and hereby is, fined in the sum of one hundred ($100.00) dollars, and the costs of this action, taxed at $———, and that he be imprisoned in the county jail for a period of thirty days. And now the court informs defendant of his right of appeal, and bail pending said appeal is fixed at $500, and ten days given to take appeal, 60 days to prepare and serve case-made, ten days to suggest amendments thereto, to be signed and settled on five days' notice. To the rendition of which said judgment and sentence the defendant excepts at the time."

By this record it clearly appears that while the jury have found the defendant guilty of simple assault and battery, which under our statute is a misdemeanor, the court has found the defendant guilty of a felony, to wit, an assault with intent to kill, which, we have no doubt, is clearly reversible error. While the punishment inflicted is the maximum punishment for assault and battery, it is also the minimum punishment for the crime of assault with intent to kill, as provided by our statute. Now, it seems to us that the law never intended that the court should pass sentence and judgment upon a defendant, finding him guilty of a greater or more serious offense than that of which the jury by their verdict had convicted him. In this case, if allowed to stand, the record would show that the jury had found the defendant guilty of a misdemeanor, and the court, passing sentence upon that verdict, had increased the degree of the offense to make it a felony.

This we think is error, for which the judgment is reversed, and the cause remanded for sentence in accordance with the verdict of the jury, and costs assessed to Kingfisher county. All of the justices concurring.

COMMONWEALTH v. FOSTER.

(Supreme Judicial Court of Massachusetts, Suffolk, 1877. 122 Mass. 317, 23 Am. Rep. 326.)

GRAY, C. J.[7] * * * By our law, several offenses of the same general nature, and punishable in the same manner, may be joined in one indictment; and, in case of a general verdict of guilty upon all the counts, the sentence may be either entire upon the whole indictment, or distinct upon each count, and to take effect upon the expiration of a previous sentence, and a defect in one count does not invalidate the sentence upon the others. Josslyn v. Commonwealth, 6 Metc. 236; Kite v. Commonwealth, 11 Metc. 581; Commonwealth v. Costello, 120 Mass. 358; Commonwealth v. Brown, 121 Mass. 69.

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[7] Part of this case is omitted.

This case presents the question whether a defendant, who has been found guilty generally upon an indictment containing several counts for distinct offenses, and has been sentenced on some of the counts to imprisonment, and has been imprisoned under such sentence, can at a subsequent term be brought up and sentenced anew upon another count in the same indictment. * * *

By the law of England and of this commonwealth, when a verdict of guilty has been returned upon one count of an indictment, the defendant may be lawfully sentenced thereon, although no verdict has been returned upon another count. Latham v. The Queen, 5 Best & S. 635, 9 Cox, Cr. Cas. 516; Edgerton v. Commonwealth, 5 Allen, 514. In Latham v. The Queen it was indeed said that the counts were to all intents and purposes separate indictments, and the defendant might afterwards be tried on the second count; but this point was not before the court. On the other hand, in Edgerton v. Commonwealth, this court was of opinion that there could be only one judgment upon the indictment, and that consequently a judgment and sentence upon one count definitively and conclusively disposed of the whole indictment, and operated as an acquittal upon, or discontinuance of, the other count. And the same view has been affirmed by decisions in other states. Guenther v. People, 24 N. Y. 100; Girts v. Commonwealth, 22 Pa. 351; Weinzorpflin v. State, 7 Blackf. (Ind.) 186; Stoltz v. People, 4 Scam. (Ill.) 168; State v. Hill, 30 Wis. 416; Kirk v. Commonwealth, 9 Leigh (Va.) 627; Nabors v. State, 6 Ala. 200; Morris v. State, 8 Smedes & M. (Miss.) 762.

We have no doubt that this is the true view, and that the same principle applies to a case in which a verdict of guilty is returned upon all the counts, and sentence is passed upon some of them—especially where, as in the present case, all the counts are against the same person, and no special order is made, at the term at which the judgment is rendered, continuing the case for further proceedings. The sentence upon the first two counts, though erroneous and liable to be reversed by writ of error, yet, having been rendered by a court which had jurisdiction of the party and of the offense, on a verdict returned in due form, was not absolutely void. Commonwealth v. Loud, 3 Metc. 328, 37 Am. Dec. 139; Kite v. Commonwealth, 11 Metc. 581, 585; Ex parte Lange, 18 Wall. 163, 174, 21 L. Ed. 872. The sentence might have been amended at the same term, and before any act had been done in execution thereof. Commonwealth v. Weymouth, 2 Allen, 144, 79 Am. Dec. 776.[8] But after the defendant had been imprisoned under it, and the term had been adjourned without day, the court could not amend it, or set it aside and impose a new sentence instead. Rex v. Fletcher, Russ. & R. 58; Brown v. Rice, 57 Me. 55, 2 Am. Rep. 11; Commonwealth v. Mayloy, 57 Pa. 291; Ex parte Lange, above cited. This is not like a case in which the indictment has been ordered by the court to be laid on file, without any judgment against the defendant, as in Commonwealth v. Dowdican's Bail, 115 Mass. 133.

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[8] See Price v. Commonwealth, 33 Grat. (Va.) 819, 36 Am. Rep. 797 (1880).

The result is that it was not in the power of the superior court, after having rendered one judgment and sentence against the defendant, upon which he had been since imprisoned, to order at a subsequent term that the case should be brought forward and another sentence imposed.

Exceptions sustained.[9]

BURRELL v. STATE.

(Supreme Court of Nebraska, 1889. 25 Neb. 581, 41 N. W. 399.)

COBB, J.[10] * * * The jury found the defendant guilty on 16 of the 17 counts of the indictment, one of which was for selling to a minor, for which the law fixes the punishment at a fine of $25. The sentence should have been upon the theory that the verdict is sustained by the evidence; that the defendant pay a fine of so much for the offense for which he stands convicted upon the first count of the indictment, and so on; but, instead thereof, there is one solid fine assessed against the defendant, for the sum of $1,525.

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[9] See also People v. Meservey, 76 Mich. 223, 42 N. W. 1133 (1889); Commonwealth v. Mayloy, 57 Pa. 291 (1868); State v. Cannon, 11 Or. 312, 2 Pac. 191 (1884).

"Objection is also made to the action of the judge in amending the entry of the judgment a month after it was made. But, if this was necessary to make the record correspond to the fact, there was certainly no want of power. It seems that the entry as made failed to show that the verdict was one of murder in the first degree, and also gave the sentence incorrectly. This misprision of the clerk it was entirely proper to correct, and there was nothing in the lapse of time which could constitute an impediment." Cooley, J., in People v. Bemis, 51 Mich. 426, 16 N. W. 794 (1883).

"Where a prisoner is under sentence for one crime, it is no bar to his trial, conviction, and sentence for another and higher grade of crime, committed while he is undergoing imprisonment for the first. This was always the doctrine under the common law. While the courts held that the plea autrefoit attaint, or a former attainder, was a good plea in bar, whether it was for the same or any other felony, yet there were certain well-recognized and established exceptions to the rule, among which were that an attainder in felony was no bar to an indictment for treason, because the judgment and manner of death was different and the forfeiture was more extensive. Another exception which obtained was that where a person attainted of any felony was afterward indicted as principal in another, in which there were also accessories prosecuted at the same time. In that case it was held that the plea of autrefoit attaint was no bar, but that he should be compelled to take his trial for the sake of public justice, because the accessories to such second felony could not be convicted until after the conviction of the principal. Hence followed the rule that a plea of autrefoit attaint was never good but when a second trial would be superfluous. 4 Sharsw. Blackst. 336." Wagner, J., in State v. Connell, 49 Mo. 289 (1872).

[10] Part of the opinion only is reprinted.

We have seen that there is no evidence to sustain the judgment as to four of the counts. Had a separate fine been assessed as to each count upon which there was a finding by the jury, only those upon the counts where the finding is unsustained by evidence would be reversed; but, as the fine and judgment are in solido, it must be said that the judgment is unsustained by the evidence, and it must be reversed.

The judgment of the district court is reversed, and the cause remanded for further proceedings. The other judges concur.[11]

Ex parte BURDEN.

(Supreme Court of Mississippi, 1907. 92 Miss. 14, 45 South. 1, 131 Am. St. Rep. 511.)

WHITFIELD, C. J.[12] The verdict in this case was in the following words: "We, the jury, find the defendant guilty of assault and battery with intent to commit manslaughter." Under the case of Traube v. State, 56 Miss. 153, this has been determined to be a mere conviction of assault and battery; the words "with intent to commit manslaughter" being mere surplusage. We have, therefore, a conviction for a misdemeanor. The learned circuit judge, misinterpreting this verdict, held it to be a conviction for a felony, and sentenced the defendant to six years in the penitentiary. This sentence he had no power or jurisdiction to impose. The distinction, abundantly established by authority, is between a sentence which is merely excessive or erroneous, regard being had to the particular offense, and a sentence which is absolutely void. In the former case the writ of habeas corpus cannot be availed of, but the party must appeal; else the writ of habeas corpus would be made to serve the office intended exclusively for an appeal. * * *

In the case of a judgment or sentence which is merely excessive, it seems to be well settled that, "if the court was one of general jurisdiction, such judgment or sentence is not void ab initio because of the excess, but that it is good so far as the power of the court extends, and is invalid only as to the excess, and therefore that a person in custody under such a sentence cannot be discharged on habeas corpus until he has suffered or performed so much of it as it was within the power of the court to impose. This condition exists whenever the punishment imposed is of the nature or kind prescribed by law and merely exceeds the quantity authorized, as where the offender is sentenced to a longer term of imprisonment than is prescribed for the particular offense," etc. It will be especially noted that both Cyc. and A. & E. Ency. of Law declare it to be the modern rule, according to the latest and best-considered cases, that, although the court may have jurisdiction over the subject-matter and over the person, it is without jurisdiction to impose a sentence not appropriate to the kind and nature of the offense. * * *

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[11] Cf. Stephens v. State, 53 N. J. Law, 245, 21 Atl. 1038 (1891); Lefforge v. State, 129 Ind. 551, 29 N. E. 34 (1891); People v. Carter, 48 Hun (N. Y.) 165 (1888).

[12] Part of this case is omitted.

Wherever the sentence pronounced by the circuit judge is merely excessive, or erroneous, or irregular, the writ of habeas corpus has no place, but the defendant must appeal; but wherever the sentence imposed by the circuit judge for the particular offense of which the defendant has been found guilty by the jury is void for want of power to pronounce that particular sentence, such sentence is absolutely void, and the defendant may resort to the writ of habeas corpus to release him from confinement in pursuance of such illegal sentence.

Here we have the case of a man convicted of a misdemeanor and under sentence as for a felony. Most manifestly the sentence is void absolutely, as one which the court was without power under the law to pronounce at all. It is not correct to say that, if the circuit judge interpreted this verdict to be a verdict of guilty of a felony, he was under the duty to sentence as for a felony. Whether the defendant was convicted of a misdemeanor or a felony as a matter of fact is the test as to the sentence to be imposed; not what interpretation, right or wrong, the circuit judge may have put on the verdict. The question is, what was the defendant convicted of by this verdict? and the answer is plain, "Of simple assault and battery," and that is a mere misdemeanor. How, then, could the circuit judge impose the penalty of six years' imprisonment in the penitentiary on a defendant convicted of mere assault and battery? It is manifest that his judgment was absolutely void.

The argument that habeas corpus does not lie to correct a merely excessive sentence is sound enough; but the sentence must always be one proper for a misdemeanor where the conviction is of a misdemeanor, and one proper for felony where the conviction is of a felony, else we would introduce interminable confusion into the law. If in this case, for example, the circuit judge, treating this judgment, as he should have treated it, as a conviction of simple assault and battery, had imposed an excessive sentence as for a misdemeanor, we would have had the case of a merely excessive or irregular or erroneous sentence; but, when he undertook to impose upon the defendant a felony sentence for a conviction for misdemeanor, it becomes perfectly clear that he imposed a sentence which he was without power or jurisdiction to impose. The one would have been a mere irregular exercise of power; the other the exercise of a power he was wholly without, since in no possible case could he have imposed a felony sentence for a mere misdemeanor.

One other observation is due to be made, however, in this case, and that is that, since this verdict is not a nullity, but was a good verdict for assault and battery, the relator should not be discharged, but should be remanded to the circuit court for proper sentence as for assault and battery. See 21 Cyc. p. 306, par. 15, where it is said, citing authorities: "The court may also have jurisdiction to commit a party on one ground, but not on another, and may nevertheless commit him on both grounds; and in such case the prisoner ought not to be discharged so long as he is properly imprisoned under the valid portion of the commitment."

The decree is affirmed.[13]

FULTS v. STATE.

(Supreme Court of Tennessee, 1854. 2 Sneed, 232.)

TOTTEN, J.[14] At January term, 1854, of the circuit court of Grundy, David Fults, with others, was convicted of an affray. He was sentenced to a fine of $10 and two days' imprisonment. The fine and costs were secured, and there appears of record the following entry:

"On motion of defendant, David Fults, and for reasons appearing to the satisfaction of the court by admission of the Attorney General and the evidence in the case, he is permitted to enter into recognizance to appear at the next term of this court and then undergo the imprisonment adjudged against him, and abide by and perform the sentence of the court."

The defendant gave bail, and at the next term made his appearance before the court. It was thereon ordered that the defendant be imprisoned in accordance with the judgment at the former term, and the defendant appealed in error to this court.

We see nothing irregular in this proceeding to which the defendant can except. There are many cases, no doubt, where it is necessary, and proper, to suspend the execution of the final judgment. For instance, where the prisoner has become non compos between the judgment and the award of execution; or, in order to give room to apply to the executive for a reprieve or pardon, or in special cases, where the necessity and propriety of such course are rendered evident to the mind of the court. Allen v. State, Mart. & Y. 297; 4 Bl. Com. 395.

In Allen's Case it was considered that a right to petition the executive for a pardon was a constitutional right, and as the prisoner was convicted of manslaughter, and sentenced to be branded in the hand, under the law then in force, time was allowed him until the next term to petition for a pardon. He was also permitted to give bail, the court remarking: "In common cases, where the party can give bail reasonably, to secure his appearance, that he may be forthcoming and subject to the sentence of the law, is all that the law requires."

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[13] Mayes, J., dissented.

[14] Part of this case is omitted.

Now it is true that the order does not state for what cause the respite was granted. It were better, no doubt, that the cause be stated, that it may appear to be such as the law will recognize. We are bound, however, to presume from the silence of the record in this respect, that the respite was granted on sufficient cause; but, if it were not, it is clear that the objection is one not to be made by the defendant who takes the benefit of it.

The judgment will be affirmed.[15]

Ex parte ROHE.

(Supreme Court of Arkansas, 1843. 5 Ark. 104.)

This was an application for a writ of habeas corpus. Rohe was brought before Hon. Thomas S. Reynolds, mayor of Little Rock, on the 10th of April, 1843, charged with an attempt to rescue, from the custody of the city constable, a person who was in his custody. He required no jury; and the mayor, after hearing evidence, adjudged that the state recover of him, for the use of the city, $25 and costs.

On the same day he issued the following warrant, by virtue of which Rohe was confined: "State of Arkansas, County of Pulaski, City of Little Rock. To the Sheriff or Jailer of said County: You are commanded to take the body of Frederic Rohe, and safely keep him until discharged by due course of law." Which was signed by him as mayor. The writ of habeas corpus being returned, the matter was argued by Blackburn, for the petitioner.

PASCHAL, J. The mittimus returned by the sheriff sets forth no offense with which the prisoner is charged, or of which he stands convicted; nor does the said precept run in the name of the state. When a man is imprisoned, the cause of his caption and detention should be sent along with him. The writ is wanting in a constitutional provision necessary to all writs; and it is equally insufficient in not setting forth the cause of the restraint of liberty.

The prisoner must, therefore, be discharged.[16]

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[15] But see In re Webb, 89 Wis. 354, 62 N. W. 177, 27 L. R. A. 356, 46 Am. St. Rep. 846 (1895); In re Markuson, 5 N. D. 180, 64 N. W. 939 (1895).

[16] See, also, Kenney v. State, 5 R. I. 385 (1858); In re Thayer, 69 Vt. 314, 37 Atl. 1042 (1897). Cf. People v. State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139 (1894). In some states it is provided by statute that the warrant of commitment shall be a certified copy of the judgment as entered in the minutes of the court. See Ex parte Dobson, 31 Cal. 497 (1867).

STATE v. KITCHENS.

(Court of Appeals of South Carolina, 1835. 2 Hill, 612, 27 Am. Dec. 410.)

The prisoner was indicted and convicted for murder, at Fall term, 1834, and sentence of death passed on him. Before the day of execution arrived, the sheriff died, and there was, on the day appointed, no sheriff to execute the sentence. At Spring term, 1835, the solicitor moved the court (Mr. Justice Gantt presiding) to assign another day for execution. The prisoner's counsel showed, for cause against the motion, the sentence had once been passed, and that it had not been executed was not the fault of the prisoner, and moved for his discharge. The court refused the motion to discharge, and the counsel for the prisoner appealed.

O'NEALL, J. It seems that the established practice in England, prior to St. 25 Geo. II, c. 37, was "for the judge to sign the calendar, a list of all the prisoners' names, with the separate judgments in the margin, which is left with the sheriff," and by it he does "execution within a convenient time." By St. 25 Geo. II, c. 37, the judges are directed, in cases of conviction for murder, to pronounce sentence in open court, and the statute fixes the time of execution. In this state, the practice has been to sentence the prisoner in open court, and assign a day for his execution. In the case of State v. Smith, 1 Bailey, 283, 19 Am. Dec. 679, the prisoner received a conditional pardon, and was discharged from prison; but, having afterwards violated the condition, he was held to be liable to execution under the conviction and judgment. So in Addington's Case, 2 Bailey, 516, 23 Am. Dec. 150, the prisoner, who had violated the condition of his pardon, and in the meantime the statute under which he had been convicted was repealed, was held to be liable to execution. In Duestoe's Case, 1 Bay, 377, the prisoner escaped between judgment and the day of execution, and after some years was taken, another day was assigned for his execution, and he was executed. In Loyd's Case, the prisoner was not executed on the day assigned for execution, owing to the new arrangement of the circuit court districts under the act of 1800. He was held by the Constitutional Court not to be entitled to his discharge, a day was assigned, and he was executed.

These precedents would be enough to dispose of the prisoner's motion, but the case does not depend alone on them. The same conclusion must have been arrived at if there had been no decision on the subject in the state. "In the Case of the Earl of Ferrers, it was resolved by all the judges that if a peer be convicted of murder before the lords in parliament, and the day appointed by them for execution pursuant to 25 Geo. II should lapse before such execution done, a new time may be appointed for the execution." Hawk. P. C. bk. 2, c. 51, § 1; Fost. 140. That case is perfectly parallel with this, for in both the day of execution is part of the sentence, and in both the execution was not stayed by any act of the prisoner.

But, independent of cases, the clear and well-settled principle that the judgment is not executed 'till the prisoner be hanged until he be dead is enough to authorize the court to assign a new day. The judgment stands in full force until the prisoner be executed or pardoned. For Hawkins, bk. 2, c. 51, § 7, says: "It is clear, that if a man condemned to be hanged, come to life after he be hanged, he ought to be hanged again, for the judgment is not executed till he be dead." This shows that the judgment can only be satisfied by an actual execution, and if the execution attempted is prevented by accident from being effectual, that still the judgment of the law remains and must be executed.

The motion is dismissed.

JOHNSON and HARPER, JJ., concurred.

CHAPTER XVI

APPEAL, WRIT OF ERROR, AND CERTIORARI

REX v. INHABITANTS OF SETON.

(Court of King's Bench, 1797. 7 Term Report, 373.)

The defendants, the inhabitants of the township of Seton, were indicted for not repairing a road; and after verdict and judgment at the quarter sessions a certiorari was served to remove the record here.

Chambre on a former day in this term moved to quash the certiorari quia improvidè emanavit, observing that the party who now wished to remove the record could only do so by writ of error.

Law now showed cause against that rule, and insisted that all the proceedings below were stayed by the issuing of the certiorari, which was before verdict in this case. In 2 Ld. Raym. 1305, Powell, J., said: "A writ of certiorari removes any order or conviction, though they be made or taken after the teste of the writ, so they be taken before the return." And in that case the inquisition taken after the teste but before the return of the certiorari was quashed by this court for defects appearing on the inquisition.

Lord Kenyon, C. J. In the case of summary proceedings, orders, and convictions before magistrates, the proceedings may be removed by certiorari after judgment, because such proceedings can only be removed by certiorari; but where a judgment has been given on an indictment, the record must be removed by writ of error. If any fraud or misconduct had been imputed to the magistrates in proceeding notwithstanding the issuing of the certiorari, that might have been a ground for a criminal proceeding against them; and I believe there are instances in which a criminal information has been granted against magistrates acting in sessions. In this case if the party, who sued out the certiorari, wish to object to the proceedings, he must remove the record by writ of error; but this writ must be quashed.

Per Curiam. Rule absolute.[1]

LONG'S CASE.

(Court of Queen's Bench, 1595. Cro. Eliz. 489.)

William Long was indicted at Norwich, within the county of the city of Norwich, of the felonious stealing of a piece of linen cloth, and was thereof arraigned, and pleaded not guilty, and was found guilty, and prayed his clergy, and was burnt in the hand. Upon information to the court that this indicting of him was by practice, and he found guilty upon small evidence, he obtained a certiorari to remove the whole record into the crown office; which being removed, there were divers exceptions to the indictment to discharge the same. For it was moved that it might well have been discharged by exception, and there needed not any writ of error to avoid it; and he could not have a writ of error, as the case is, because he was a clerk convicted only, and not attainted; for when he prayed his clergy, which was allowed him, there never was any judgment afterwards given. And of that opinion was the whole court.[2]

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[1] Accord: Hertel v. People, 74 Ill. App. 304 (1897). See, also, Thayer v. Commonwealth, 12 Metc. (Mass.) 9 (1846).

TAFF v. STATE.

(Supreme Court of Errors of Connecticut, 1872. 39 Conn. 82.)

SEYMOUR, J. The plaintiff in error was duly convicted of violating the first section of "the act to prevent and remove nuisances." The conviction was upon the presentment of an informing officer, and section 13 of the act provides that every person so convicted shall be fined not less than $5 nor more than $50. It appears by the record that the fine actually imposed by the court is $4, and because the fine is thus less than the defendant was entitled to, he brings this writ of error to reverse the judgment.

Notwithstanding many old cases to the contrary, the settled law in Connecticut is that no party can set aside a judgment by writ of error, unless he is aggrieved by the judgment of which he complains. This sound and just doctrine is so fully and ably vindicated by the late Chief Justice Williams in the case of Alling v. Shelton, 16 Conn. 436, as to require no further discussion. The only question before us is how far that doctrine applies to the present case.

We think it clear that the sentence to pay a fine of $4 is not warranted by the statute. The thirteenth section is as peremptory in its language in forbidding a fine of less than $5 as it is in forbidding one of more than $50. If, then, we decide that the defendant shall pay the $4 fine, we decide that he must pay a fine which the court below had no authority to inflict, and which the language of the statute forbids to be inflicted.

Is the defendant aggrieved by this sentence? If there is nothing more in the case, he certainly is aggrieved by an order to pay an unwarrantable fine. Can we, then, use the defendant's liability to the higher penalty as a ground for supporting the lower, but unwarranted, penalty, which appears by the record to have been inflicted? We think we cannot. It is true that the defendant is not as much damaged by the sentence actually given as he would have been had the legal sentence been pronounced. But the legal sentence has not been pronounced, and we have no power to pronounce it.

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[2] See, also, State v. Daugherty, 39 W. Va. 470, 19 S. E. 872 (1894); People v. Walker (Cal.) 61 Pac. 800 (1900). Cf. State v. Morgan, 33 Md. 44 (1870).

If the plaintiff in error succeeds, he relieves himself from an unlawful sentence, and does not thereby ipso facto subject himself to the lawful penalty. Whether he thereby puts himself in the way of being subjected to the lawful penalty upon further proceedings we have no occasion to decide. We think, therefore, that the judgment, so far as the fine is concerned, must be reversed.

A question then arises what effect has such reversal upon the other parts of the judgment. The statute provides that the court before whom the conviction is had shall order the defendant to remove such nuisance within 30 days. This order was made, and a further order that the defendant pay a bill of costs. The case of Matter of Sweatman, 1 Cow. (N. Y.) 144, is full to the point that a judgment may be erroneous in part, and valid as to the residue. That case was well considered and elaborately discussed, and is cited by us with approbation in the recent case of State v. James, 37 Conn. 355. The judgment there was a full and complete judgment according to law, with the addition of something not warranted by law, and the maxim, "Utile per inutile non vitiatur," was applicable, and applied to the case.

But the argument here for the plaintiff in error is that, the sentence to pay the fine being illegal and reversed, the judgment which remains is not a full and complete judgment, and ought for that cause to be set aside. But it is difficult to see how the plaintiff in error can be aggrieved by this imperfection, unless, indeed, it be so imperfect as for that cause to be invalid. If the statute was such that the court were prohibited from rendering the judgment to remove the nuisance and pay the cost, without also imposing a fine, then indeed, perhaps the plaintiff in error might be aggrieved, but the statute makes no such prohibition. On the contrary, the statute expressly requires the court to order the removal of the nuisance. This order the court below made, and we cannot say the order is erroneous, merely because the court failed to do its duty in respect to the fine. The case of Alling v. Shelton, is full to this point.

The judgment, therefore, of the superior court is reversed as to the fine, but in all respects except as to the fine it is affirmed. In this opinion the other Judges concurred.[3]

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[3] Accord: State v. Kennedy, 88 Mo. 341 (1885); Montgomery v. State, 7 Ohio St. 107 (1857).

Where two persons are jointly indicted, the court may, on writ of error, affirm the judgment as to one defendant and reverse as to the other. Fletcher v. People, 52 Ill. 395 (1869).

McDONALD v. STATE.

(Supreme Court of Maryland, 1876. 45 Md. 90.)

Appeal from the criminal court for Baltimore city.

MILLER, J.[4] The plaintiff in error was indicted for murder, and on his trial was found guilty of manslaughter and not guilty of murder. Upon this verdict the criminal court of Baltimore city, in which he was tried, pronounced judgment, sentencing him to "five years imprisonment in the jail of Baltimore city," and this judgment is brought before us for review, by writ of error.

The punishment prescribed by law (Acts 1864, c. 39) for the crime of manslaughter is confinement in the penitentiary for not more than ten years, or, in the discretion of the court, a fine of not more than five hundred dollars, or imprisonment in jail for not more than two years, or both fine and imprisonment in jail. The Attorney General admits that through inadvertence a sentence was imposed on the prisoner, which the law does not authorize, and concedes, upon the authority of Watkins v. State, 14 Md. 412, this judgment must be reversed. That is undoubtedly so, and the only other question we can now decide is whether upon such reversal this court has the power to impose the proper sentence, or to remand the case to the court of original jurisdiction for that purpose. In the absence of legislation conferring that authority upon this court, it is clear it has no power to do either of these things.

In Watkins v. State, where the judgment was reversed for a similar defect, the court say: "The effect of the reversal for error in the judgment itself is properly stated by the counsel for the plaintiff in error in his argument. It defeats all former proceedings in the cause. This will abundantly appear by reference to the following authorities cited by him on this point: 1 Chitty's Cr. Law, 755; 4 Bl. Com. 393; Hawkins, Bk. 2, c. 50, § 19." In addition to these authorities we refer to several more recent decisions of the English and Irish courts upon the subject, viz., Rex v. Ellis, 5 Barn. & C. 395, King v. Bourne, 7 Adol. & E. 58, Silversides v. The Queen, 2 Gale & D. 617, and Holland v. The Queen, 2 Jebb & S. 357. In each of these, and especially in the first two, it was, upon full review of all previous decisions, denied that a court of error had any power, in a case like this, either to remand the record to the court below for the proper judgment, or itself to pronounce such judgment as the law authorized, and Rex v. Kenworthy, 1 Barn. & C. 711, which was cited in support of the power to remand, is there shown to be a case in which no judgment had in fact been given, and it was therefore remitted back to the sessions in order that a judgment might be rendered.

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[4] Part of this case is omitted.

In this country, also, the decisions wherever the question has arisen, are almost uniform and to the same effect. It was so decided in several cases by the Supreme Court of Massachusetts, and we need refer only to Christian v. Commonwealth, 5 Metc. 530. After these decisions the Legislature of that state provided by statute that "whenever a final judgment in any criminal case shall be reversed by the Supreme Judicial Court, upon a writ of error, on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before whom the conviction was had." And the Supreme Court of that state has since acted under that statute. Jacquins v. Commonwealth, 9 Cush. 279. In New York there is a series of cases in the inferior courts to the like effect, and in Ratzky v. People, 29 N. Y. 124, the Court of Appeals of that state held it to be well-settled law that, but for the authority conferred upon that court by the statute of 1863, it would have no power upon reversal of the judgment of the Supreme Court in that case for error in the judgment itself, either to pronounce the appropriate judgment, or remit the record to the oyer and terminer, to give such judgment. The statute referred to declared, in effect, that the appellate court shall have power upon any writ of error, when it shall appear that the conviction has been legal and regular, to remit the record to the court in which such conviction was had, to pass such sentence thereon as the appellate court shall direct. There are also numerous cases in other states where the same question has been incidentally decided in the same way.

In Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872, the judges of the Supreme Court of the United States, though differing upon other points, agree in the proposition that, apart from authority conferred by the Legislature, appellate tribunals have only the power of reversal where in criminal cases the judgments are entire, and not such as the law authorizes to be imposed, and all the cases on the subject are collected and referred to in the dissenting opinion of Mr. Justice Clifford, in that case.

We have been able to find but two cases which are in even seeming conflict with the great weight and current of judicial precedent and authority on this question. * * *

Whether the plaintiff in error, by thus requesting and obtaining his discharge from this indictment, has waived the protection which the law provides against a second jeopardy, so that he can be reindicted and retried on the same charge, as has been suggested by some jurists and text-writers, is a question we are not now at liberty to decide. It has not been argued on either side by counsel, and we should be stepping far beyond the line of duty, if not committing a grave impropriety, in now expressing any opinion upon it. We can only say with Shaw, C. J., in Christian v. Commonwealth, that "whatever other remedy the state may have, it is not competent for this court to pass a new sentence upon this prisoner, nor to remit the case to the criminal court." Our power is limited to a simple reversal of the judgment.[5]

Judgment reversed.[6]

JOAN v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts, Bristol, 1883. 136 Mass. 162.)

By the Court.[7] The assignments of error aver that the building which the plaintiff in error was convicted of burning was not a dwelling house, as alleged in the indictment, and that it was not the property of the person alleged in the indictment to be the owner. Both of these facts were put in issue and were tried in the superior court. The plaintiff in error cannot retry them upon a writ of error. No error in the judgment is shown, and the evidence offered was properly rejected.

Exceptions overruled.

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[5] After the above decision was rendered, the prisoner, Patrick McDonald, was arrested, while in the jail, upon a bench warrant issued out of the criminal court of Baltimore city, charging him with the murder of Daniel Brown. Whereupon he petitioned Hon. Jas. L. Bartol, C. J., for a writ of habeas corpus, which was granted; and upon the hearing it was admitted, on the part of the state, that the felony and murder charged in the warrant was the same as that for which the petitioner had before been indicted and tried. The Chief Judge, after full argument, discharged the petitioner, deciding: * * *

(4) That the petitioner, by suing out his writ of error, and obtaining a reversal of the judgment, had not waived the protection which the law provides against a second jeopardy, and was not liable to be again indicted and tried for the same offense.

In the opinion rendered by the Chief Judge, he remarked: "If the prisoner, after having been duly convicted of manslaughter, escapes punishment by reason of an error in the sentence, this results from the want of legislative provision in such cases to enable the court of last resort to correct the sentence, or to remand the case to the criminal court for that purpose. Such legislation was had in England in 1848 (11 & 12 Vict. c. 78), and has been enacted in several of the states."

[6] Compare Wharton v. State, 41 Miss. 680 (1868).

[7] Part of this case is omitted.

"It is only legal errors which can be considered on writs of error—errors appearing in the record, or by exceptions taken upon the trial. * * * In People v. Thompson, 41 N. Y. 1, the prisoner was convicted of manslaughter in the second degree, and, although it appeared by the evidence that the prisoner was not guilty of that offense, the court held that, as there was no exception, it could not reverse the judgment." Andrews, J., in Gaffney v. People, 50 N. Y. 425 (1872).

Accord: Claassen v. U. S., 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966 (1891).

HORNBERGER v. STATE.

(Supreme Court of Indiana, 1854. 5 Ind. 300.)

Appeal from the Dearborn court of common pleas.

STUART, J. Information against Hornberger for retailing, etc. Trial by the court, fine $10, and judgment accordingly.

Hornberger appeals; but on what grounds does not very clearly appear.

There was no exception taken to any ruling of the court in the progress of the trial. 2 Rev. St. 377.

No motion was made for a new trial, nor in arrest of judgment. 2 Rev. St. 380.

There is none of the evidence in the record; nor does it appear that he even interposed a motion to quash the information. 2 Rev. St. 368.

At the common law there were some defects which might be taken advantage of, either by motion to quash, or by motion in arrest, or upon error. But now the writ of error is abolished. 2 Rev. St. 158; Id. 381. The motion to quash, motion for a new trial, and motion in arrest of judgment yet remain, curtailed and modified by statute. 2 Rev. St., supra. In their very nature, each of these motions, with their several incidents, are to be addressed to the court below. But the statute does not leave this matter in doubt. It is minutely provided when, how, and in what order they are to be made. 2 Rev. St., supra. If any ruling of the court in the premises is deemed incorrect, the statute further points out the time and mode of exception and appeal. 2 Rev. St. 377, 381.

These are the established modes of raising points in the record for the consideration of this court. A bare appeal cannot of itself avail the party taking it, unless the preliminary steps to raise questions in the record have been adopted. It is not the errors pointed out in argument that we are to review. Nor, in general, even the errors apparent in the record. But it is the errors to which the aggrieved party has excepted at the time, in the manner pointed out in the foregoing statutes.

Whether there may not be some exceptions to this rule is not now before us to inquire, and no opinion is intimated.

It is sufficient in this case that Hornberger does not appear as objecting to anything. There is consequently nothing presented in the record for us to review. We are bound to presume that all things were done correctly in the common pleas, unless the contrary is made to appear.

The whole spirit of the new Code is to hold every failure to assert a legal right at the proper time to be a waiver of that right. It gives still greater consequence to the legal maxim that "the law favors the vigilant." To this end it is specific as to the objections available in criminal cases; and it is specific as to when, where, and in what manner they should be made. The object seems to have been that cases should not be reversed in this court on questions never raised or agitated in the court below.

If, therefore, parties would have decisions made against them reversed, they must take the proper steps, at the proper time; and the record must show that fact. 2 Rev. St. 377, 380. It is too late to raise such questions for the first time in this court, by way of argument.

This doctrine does not conflict with Divine v. State, 4 Ind. 240; for there the defendant interposed a motion to quash.

Nor does it conflict with Hare v. State, 4 Ind. 241; for there the defective allegation was aided by the evidence.

Nor does it conflict with Wood v. State (at the present term) 5 Ind. 433; for that case is governed by the law in force prior to the taking effect of the Revised Statutes.

There being no question raised in the record, and nothing for us to decide, the judgment of the common pleas must stand.

Per Curiam. The judgment is affirmed, with costs.[8]

TAYLOR v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1862. 44 Pa. 131.)

Thompson, J. This is a common-law writ of error, and brings up the record of the trial and conviction of the plaintiff in error for the murder of one George Jackson, of the county of Mercer, on the 22d of October, 1861. The conviction was of murder in the second degree, upon which he was sentenced to solitary confinement at hard labor, in the Western Penitentiary, for the full maximum period for the first offense of this kind, viz., eleven years and six months.

No allegation is made that the prisoner had not a full, fair, and impartial trial by a jury of the vicinage, aided by counsel, and presided over by a competent and legally constituted court; nor that every constitutional and legal right was not accorded to him to the fullest extent. But the complaint is that it does not appear by the record that he had these constitutional and legal rights accorded to him, and I agree that if this were true the conviction could not stand. In order to ascertain how this is, we must apply ourselves to ascertain what is the record. Is it the minutes of the clerk, or the record presumed to be made up by the court, containing a short and distinct history of the proceedings constituting the trial and judgment, and kept among the records in the well-known and authorized record books? If it be not the latter, there is no safety in records and their imputed absolute verity would be a mere abstraction, meaning nothing, and resting only on a duty to believe in them. When, therefore, a record is made up, the elements constituting it are not suffered to contradict it. Neither the knowledge of the court nor the minutes of the clerk can avail for this. Either one of them or both together may suffice to correct it, if resorted to in proper time, but the elements so used to correct become the record, and are no longer the recollection of the court, or the minutes of the clerk.

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[8] Accord: State v. Lawrence, 81 N. C. 522 (1879).

Now, we have here a complete record of the court, and also the minutes of the clerk, from which it is to be presumed the record was made up, and it is claimed that the latter may not merely explain, but contradict, the former; that we must consult the inorganized and informal matter, and so set aside the organized, approved, and formal record; that is to say, attack and overturn the record by something less than the record—overthrow absolute verity by that which imports no absolute verity. To state the proposition is to demonstrate its fallacy.

Now, what does the record of the court and its legal and necessary intendments show? First. That on the 21st of January, 1862, the prisoner was brought into open court, and being arraigned, did for himself plead not guilty, and of this put himself on God and the country. District Attorney similiter, and issue, and thereupon he was remanded to jail. That on the 22d of January, the day following, the court being in session, the prisoner being again brought into court by the sheriff, the clerk was ordered to draw a jury from a box containing the names of jurymen regularly summoned and in attendance, and that the clerk did so call a jury, "the said Dennison Taylor having had his legal and proper challenges." That they came, to wit, etc., "twelve good and lawful men, summoned and returned, impaneled and sworn," "who on the 25th day of January, 1862, the prisoner being present in court, on their solemn oaths respectively do say that they find the prisoner at the bar, Dennison Taylor, guilty of murder in the second degree, in manner and form as he stands indicted," and thereupon the prisoner was remanded to jail by the court. On the next day, the 26th, the record shows that the prisoner was brought into court, and "having been asked if he had anything to say why sentence should not be passed upon him, and having said he hath nothing to say other than he hath said," the court thereupon passed sentence.

This is the usual formal record. The date, if it be material to see when the jury was sworn, is referable to the date when the record shows they were called or balloted for. No contrary presumption overrides the date. The record is express that the prisoner was present, and had his legal and proper challenges before the jury was sworn. No record will give more details than this, for it is the usual and ordinary practice to swear the jury separately, and when the last juror is selected he is sworn, so that when the record shows that the prisoner was present, and had his legal and proper challenges, it necessarily shows that he was present during the entire selection and qualification of the jury.

No record, after the trial commences, ever does more than show the action of the court and jury. It does not set forth who were counsel, in what order the jury were addressed, when the judge charged the jury, whether or not the prisoner was present at that moment, or takes any account of adjournments. All these things are regulated by law and usage, and the presumption in regard to them is that they have been done according to law, and rightly done.

Since the enactment of the new Penal Code and the criminal procedure act, in which a writ of error lies to bring up the rulings and decisions of the court while conducting a trial for homicide, there is evident propriety in the rule laid down by this court in Cathcart v. Commonwealth, 1 Wright, 110. There my Brother Strong, in delivering the opinion of the court, said: "But, in criminal as well as in civil cases, our inquiries must be confined to the record, and in both classes of cases there is but one rule of construction. In both there is a presumption that the proceedings were regular, and it is incumbent on the plaintiff in error to show by the record that errors were committed before we can interfere. Since the allowance of writs of error to the rulings of the court, every denial of a right to the prisoner can be made to appear on the record, and when none such appear in the course of the trial, or in points to the court, the presumption that no such error has been made receives great additional force."

But, taking the record as it stands, we have the facts distinctly appearing of the arraignment in court of the prisoner, and of his presence when the jury were selected and sworn, when the verdict was rendered, and when the sentence was pronounced. No adjournments are noticed in the record, and consequently, in strictness, no legal presumption of absence from the court arises on it. The legal inference would be that no adjournments took place, and that the prisoner was in court all the time. The record shows no adjournments, and how is it to be shown that there were any? If strict law must be the rule in such a case, then this record covers every ground of objection that the prisoner was not shown to be present. This is the legal presumption from the record. But without this, when we find his presence noticed wherever it is usual to be noticed, when we find him answering that he has nothing further to say why sentence should not be pronounced "than he hath said," and not an allegation of any error committed in fact, we think that the fair intendment of the record must be that the prisoner enjoyed all his constitutional rights on the trial.

How it can be alleged as error that the record does not show that the prisoner had not an opportunity to poll the jury I cannot comprehend. He was present when the verdict was rendered. Now, in the absence of any fact to show that he was restrained, the presumption surely is that he might have polled the jury if he had chosen to do so. If he does not choose to resort to the special form of taking the verdict, the record was quite satisfactory when it showed the verdict taken in the usual form. We think the trial, as exhibited by the record, was entirely according to the substantial forms of law. The history it gives is sufficient, and I cannot well see how the clerk could have otherwise recorded the arraignment, or the drawing or impaneling of the jury, than in the past tense. In Hamilton v. Commonwealth, 16 Pa. 133, 55 Am. Dec. 485, the doctrine applicable to this objection, as well as to the other exceptions in the case, is stated by Gibson, C. J., thus: "With us, a full record is seldom, perhaps never, formally made up; but the docket, which stands in its place, must contain the substantial parts of it, from which, together with other records in the office, such a record might be formed. It is because the proceedings remain on paper that we have been able to dispense with strict form as to tense and person, holding fast, however, to matter of substance." This doctrine calls largely on the presumption "rite acta est," and this in accordance with what is obviously proper, in view of the fact that every denial of right to a person on trial may be placed on the record for review. It was not always so, and then greater strictness was more needed.

I see nothing in the authorities cited by the counsel for the prisoner which requires a different view of this case than that we have taken, and, as we think the record substantially sufficient, this sentence must be affirmed.

Ex parte TONEY.

(Supreme Court of Missouri, 1848. 11 Mo. 662.)

PER CURIAM. In July, 1842, Toney, a slave, escaped from the service of his master, Thomas Williams, who resided in Montgomery county, in the state of Tennessee, and came to St. Louis, in this state. Whilst in that county, he committed four grand larcenies, for which he was severally indicted and tried at the July term of the criminal court of St. Louis county, and sentenced to eleven years' imprisonment in the penitentiary. He was arraigned as a free person by the name of William Morton, and on his arraignment pleaded guilty to the several indictments. His master, who had not heard of him since his escape in 1842, being informed of his confinement in the penitentiary here, sent on an agent, Wm. H. Stuart, who identified the slave, and on his behalf, who freely consents to this proceeding, and as agent for his owner, applied to this court for a writ of habeas corpus for the discharge of the slave, as the law does not warrant his confinement in the penitentiary for the offenses of which he was convicted;

he not being a free person. These facts appearing in the petition and the exhibits thereto, it was agreed by the parties that the right of the prisoner to his discharge should be determined on the application for the writ.

In deciding on the propriety of discharging a prisoner on habeas corpus, this court exercises no appellate jurisdiction. In the exercise of this power, it is confined within the same limits which would restrain a judge of the circuit or county court in its exercise. It can give no other or greater relief than is afforded by these officers. If the idea of all appellate jurisdiction is discarded, it will be obvious that this court, nor no other court nor officer, can investigate the legality of a judgment of a court of competent jurisdiction by a writ of habeas corpus. If the court has jurisdiction of the subject-matter and of the person, although its proceedings may be irregular or erroneous, yet they cannot be set aside in this proceeding. The party must resort to his writ of error or other direct remedy to reverse or set aside the judgment, for in all collateral proceedings it will be held to be conclusive.

The sixth section of the third article of the act regulating proceedings on writs of habeas corpus expressly directs that the prisoner shall be remanded if it appear that he is confined by virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction. This plain and express provision existing, and being in consonance to settled principles, we do not feel ourselves authorized to look into other parts of the statute in order to ascertain whether relief may not be afforded by them, as we cannot suppose that the Legislature intended to repeal it by any implication.

There is, then, the judgment of a court of competent jurisdiction, authorizing the confinement of the prisoner, and we cannot, in this collateral proceeding, question the correctness of that judgment. The judgment of the court is, however, erroneous, and on the facts assumed the party is entitled to some remedy. The error is one of fact. As the record stands it warrants the judgment, and it is an error of fact which produces this difficulty. If the prisoner was a slave, and it so appeared on the record, the judgment would be clearly erroneous. It is settled that for an error in fact in the proceedings of a court of record a writ of error coram vobis will lie to revoke the judgment, whether it be a court of civil or criminal jurisdiction. 2 Tidd, 1191, 1192.

If a judgment is rendered against an infant who appears by attorney, this is an error of fact for which a writ of error coram vobis will lie. So, if a judgment is rendered against a married woman who is sued as a feme sole; and so, it is conceived, of a judgment sentencing an infant under sixteen years of age to imprisonment in the penitentiary, as our statute does not permit such punishment to be inflicted on him.

No difference is seen between those cases and that now before the court, and as the prisoner consents and is anxious for his discharge, we are of opinion that the criminal court of St. Louis county can award the writ and give the party such relief as he is entitled to by law.

Writ denied, the other judges concurring.[9]

UNITED STATES v. SANGES et al.

(Supreme Court of the United States, 1892. 144 U. S. 310, 12 Sup. Ct. 609, 36 L. Ed. 445.)

In Error to the Circuit Court of the United States for the Northern District of Georgia.

Indictment of George Sanges, Dennis Alexander, Isaac Smith, and Charles Porter for murder. * * * The defendants demurred to the indictment. * * *

On October 5, 1891, the Circuit Court, held by Mr. Justice Lamar and Judge Newman, adjudged that the demurrer was well founded in law, and that it be sustained, and the indictment quashed. 48 Fed. 78.

This writ of error was thereupon sued out by the United States, and was allowed by the presiding justice. The defendants in error moved to dismiss the writ of error for want of jurisdiction.

Mr. Justice GRAY, delivered the opinion of the court.[10] The jurisdiction of this court is invoked by the United States under that provision of the judiciary act of 1891 by which "appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court," "in any case that involves the construction or application of the Constitution of the United States." Act March 3, 1891, c. 517, § 5, 26 Stat. p. 827 (U. S. Comp. St. 1901, p. 549).

But the question which lies at the very threshold is whether this provision has conferred upon the United States the right to sue out a writ of error in any criminal case.

This statute, like all acts of Congress, and even the Constitution itself, is to be read in the light of the common law, from which our system of jurisprudence is derived. Charles River Bridge v. Warren Bridge, 11 Pet. 420, 545, 9 L. Ed. 773; Rice v. Railroad Co., 1 Black. 358, 374, 375, 17 L. Ed. 147; U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135; Ex parte Wilson, 114 U. S. 417, 422, 5 Sup. Ct. 935, 29 L. Ed. 89; 1 Kent, Comm. 336. As aids, therefore, in its interpretation, we naturally turn to the decisions in England and in the several states of the Union, whose laws have the same source.

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[9] Accord: Ex parte Gray, 77 Mo. 160 (1882); Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29 (1882).

[10] Part of the opinion is omitted.

The law of England on this matter is not wholly free from doubt. But the theory that at common law the king could have a writ of error in a criminal case after judgment for the defendant has little support beyond sayings of Lord Coke and Lord Hale, seeming to imply, but by no means affirming, it, two attempts in the House of Lords, near the end of the seventeenth century, to reverse a reversal of an attainder, and an Irish case and two or three English cases, decided more than 60 years after the Declaration of Independence, in none of which does the question of the right of the crown in this respect appear to have been suggested by counsel or considered by the court. 3 Inst. 214; 2 Hale, P. C. 247, 248, 394, 395; Rex v. Walcott, Show. Parl. Cas. 127; Rex v. Tucker, Show. Parl. Cas. 186, 1 Ld. Raym. 1; Regina v. Houston (1841) 2 Craw. & D. 191; The Queen v. Millis (1843) 10 Clark & F. 534; The Queen v. Wilson (1844) 6 Q. B. 620; The Queen v. Chadwick (1847) 11 Q. B. 173, 205. And from the time of Lord Hale to that of Chadwick's Case, just cited, the text-books, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case, and that a judgment in his favor is final and conclusive. See 2 Hawk. P. C. c. 47, § 12; Id. c. 50, § 10 et seq.; Bac. Abr. "Trial," L, 9, "Error," B; 1 Chit. Crim. Law, 657, 747; Starkie, Crim. Pl. (2d Ed.) 357, 367, 371; Archb. Crim. Pl. (12th Eng. and 6th Am. Ed.) 177, 199.

But whatever may have been, or may be, the law of England upon that question, it is settled by an overwhelming weight of American authority that the state has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law.

In a few states decisions denying a writ of error to the state after judgment for the defendant on a verdict of acquittal have proceeded upon the ground that to grant it would be to put him twice in jeopardy, in violation of a constitutional provision. See State v. Anderson (1844) 3 Smedes & M. (Miss.) 751; State v. Hand (1845) 6 Ark. 169, 42 Am. Dec. 689; State v. Burris (1848) 3 Tex. 118; People v. Webb (1869) 38 Cal. 467; People v. Swift (1886) 59 Mich. 529, 541, 26 N. W. 694.

But the courts of many states, including some of great authority, have denied, upon broader grounds, the right of the state to bring a writ of error in any criminal case whatever, even when the discharge of the defendant was upon the decision of an issue of law by the court, as on demurrer to the indictment, motion to quash, special verdict, or motion in arrest of judgment.

The Supreme Court of Tennessee, in 1817, in dismissing an appeal by the state after an acquittal of perjury, said: "A writ of error, or appeal in the nature of a writ of error, will not lie for the state in such a case. It is a rule of the common law that no one shall be brought twice into jeopardy for one and the same offense. Were it not for this salutary rule, one obnoxious to the government might be harrassed and run down, by repeated attempts to carry on a prosecution against him. Because of this rule it is that a new trial cannot be granted in a criminal case, where the defendant is acquitted. A writ of error will lie for the defendant, but not against him. This is a rule of such vital importance to the security of the citizen that it cannot be impaired but by express words, and none such are used in" the statutes of the state. "Neither does the Constitution (article 11, § 10) apply, for here the punishment does not extend to life or limb. The whole of this case rests upon the common-law rule." State v. Reynolds, 4 Hayw. (Tenn.) 110. In a similar case, in 1829, the same court said: "The court are unanimously of opinion that no appeal lies for the state from a verdict and judgment of acquittal on a state prosecution. The state, having established her jurisdiction and tried her experiment, should be content. To permit appeals might be the means of unnecessary vexation." State v. Hitchcock, cited in 6 Yerg. 360, 27 Am. Dec. 469. In 1834 the same rule was applied where, after a verdict of guilty, a motion in arrest of judgment had been made by the defendant and sustained by the court. State v. Solomons, 6 Yerg. 360, 27 Am. Dec. 469.

In 1820 a writ of error obtained by the attorney for the commonwealth to reverse a judgment for the defendant on demurrer to an information for unlawful gaming was dismissed by the General Court of Virginia, saying only: "The court is unanimously of opinion that the writ of error improvidently issued on the part of the commonwealth, because no writ of error lies in a criminal case for the commonwealth." Com. v. Harrison, 2 Va. Cas. 202.

The Supreme Court of Illinois, in two early cases, as summarily dismissed writs of error sued out by the state, in the one case to reverse a judgment of acquittal upon exceptions taken at a trial by jury, and in the other to reverse a judgment reversing for want of jurisdiction a conviction before a justice of the peace. People v. Dill (1836) 1 Scam. (Ill.) 257; People v. Royal (1839) Id. 557.

In 1848 a writ of error by the state to reverse a judgment for the defendant on a demurrer to the indictment was dismissed by the Court of Appeals of New York, upon a careful review by Judge Bronson of the English and American authorities, including several earlier cases in New York in which such writs of error had been brought, of which the court said: "But in none of the cases was the question either made by counsel, or considered by the court, whether the people could properly bring error. Such precedents are not of much importance." People v. Corning, 2 N. Y. 9, 15, 49 Am. Dec. 364. That decision has been since recognized and acted on by that court, except so far as affected by express statutes. People v. Carnal, 6 N. Y. 463; People v. Clark, 7 N. Y. 385; People v. Merrill, 14 N. Y. 74, 76, 78; People v. Bork, 78 N. Y. 346.

In 1849 the Supreme Judicial Court of Massachusetts, speaking by Chief Justice Shaw, held that a writ of error did not lie in a criminal case in behalf of the commonwealth; and therefore dismissed writs of error sued out to reverse judgments upon indictments in two cases, in one of which the defendant, after pleading nolo contendere, had moved in arrest of judgment for formal defects in the indictment, and thereupon judgment had been arrested and the defendant discharged, and in the other the indictment had been quashed on the defendant's motion. Com. v. Cummings and Same v. McGinnis, 3 Cush. 212, 50 Am. Dec. 732.

In the same year the Supreme Court of Georgia made a similar decision, dismissing a writ of error sued out by the state upon a judgment quashing an indictment against the defendant; and, in an able and well-considered opinion delivered by Judge Nisbet, said: "The rule seems to be well settled in England that in criminal cases a new trial is not grantable to the crown after verdict of acquittal, even though the acquittal be founded on the misdirection of the judge. This is the general rule, and obtains in the states of our Union. It excludes a rehearing after acquittal upon errors of law, and therefore, it would seem, denies also a rehearing upon judgments of the court upon questions of law, even when the jury have not passed upon the guilt or innocence of the prisoner. If the effect of the judgment is a discharge, there can be no rehearing, either by new trial or writ of error. Indeed it may be stated, as a general rule, that in criminal cases, upon general principles, errors are not subject to revision at the instance of the state." "These principles are founded upon that great fundamental rule of the common law, 'Nemo debet bis vexari pro una et eadem causa,' which rule, for greater caution and in stricter vigilance over the rights of the citizen against the state, has been in substance embodied in the Constitution of the United States, thus: 'Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb.'" After observing that this provision of the Constitution could have no direct bearing upon that case, which was of a misdemeanor only, and in which there had been no trial by jury, the court added: "The common-law maxim and the Constitution are founded in the humanity of the law, and in a jealous watchfulness over the rights of the citizen, when brought in unequal contest with the state. It is, doubtless, in the spirit of this benign rule of the common law, embodied in the federal Constitution—a spirit of liberty and justice, tempered with mercy—that, in several of the states of this Union, in criminal causes a writ of error has been denied to the state." State v. Jones, 7 Ga. 422, 424, 425.

The Supreme Court of Iowa, in 1856, ordered a writ of error sued out by the state, after the defendant had been acquitted by a jury, to be dismissed, not because to order a new trial would be against article 1, § 12, of the Constitution of the state, declaring that "no person shall after acquittal be tried for the same offense" (for the court expressly waived a decision of that question), but only because of "there being no law to authorize a writ of error on the part of the state in a criminal case." State v. Johnson, 2 Iowa, 549.

The Supreme Court of Wisconsin, in 1864, held that a writ of error did not lie in behalf of the state to reverse a judgment in favor of the defendant upon a demurrer to his plea to an indictment. State v. Kemp, 17 Wis. 669. The Supreme Court of Missouri, in 1877, made a similar decision, overruling earlier cases in the same court. State v. Copeland, 65 Mo. 497. And the Supreme Court of Florida, in 1881, held that the state was not entitled to a writ of error to reverse a judgment quashing an indictment, and discharging the accused. State v. Burns, 18 Fla. 185.

In those states in which the government in the absence of any statute expressly giving it the right, has been allowed to bring error, or appeal in the nature of error, after judgment for the defendant on demurrer to the indictment, motion to quash, special verdict, or motion in arrest of judgment, the question appears to have become settled by early practice before it was contested.

In North Carolina the right of the state has been strictly limited to the cases just enumerated, and has been denied even when the defendant was discharged upon a judgment sustaining a plea of former acquittal as sufficient in law, or upon a ruling that there was no legal prosecutor; and the Supreme Court has repeatedly declared that the state's right of appeal in a criminal case was not derived from the common law, or from any statute, but had obtained under judicial sanction by a long practice; and has held that neither article 4, § 8, of the state Constitution of 1876, giving that court "jurisdiction to review upon appeal any decision of the courts below upon any matter of law or legal inference," nor article 4, § 27, of the same Constitution, providing that in all criminal cases before a justice of the peace "the party against whom judgment is given may appeal to the superior court, where the matter shall be heard anew," gave any right of appeal to the state, but only to the defendant. State v. Haddock (1802) 3 N. C. 162; State v. Lane (1878) 78 N. C. 547; State v. Swepson (1880) 82 N. C. 541; State v. Moore (1881) 84 N. C. 724; State v. Powell (1882) 86 N. C. 640.

The Court of Appeals of Maryland, in 1821, sustained a writ of error by the state to reverse a judgment in favor of the defendants on demurrer to the indictment, citing a number of unreported cases decided in that state in 1793 and 1817. State v. Buchanan, 5 Har. & J. 317, 324, 330, 9 Am. Dec. 534. But the same court, in 1878, refused to construe a statute of 1872, providing that in all criminal trials it should be lawful for the attorney for the state to tender a bill of exceptions and to appeal, as authorizing the court, on such exceptions and appeal, to order a new trial after a verdict of acquittal. State v. Shields, 49 Md. 301.

In Louisiana, in the leading case, the court admitted that to allow the state to bring a writ of error in a criminal case was contrary to the common law of England, to the law of most of the states, and to the general opinion of the bar; and the later cases appear to be put largely upon the ground that the practice had become settled by a course of decision. State v. Jones (1845) 8 Rob. (La.) 573, 574; State v. Ellis (1857) 12 La. Ann. 390; State v. Ross (1859) 14 La. Ann. 364; State v. Taylor (1882) 34 La. Ann. 978; State v. Robinson (1885) 37 La. Ann. 673.

The Supreme Court of Pennsylvania, from an early period, occasionally entertained, without question, writs of error sued out by the state in criminal cases. Com. v. Taylor (1812) 5 Bin. 277; Com. v. McKisson (1822) 8 Serg. & R. 420, 11 Am. Dec. 630; Com. v. Church (1845) 1 Pa. 105, 44 Am. Dec. 112. The first mention of the question appears to have been in a case in which the only objection taken to the right of the commonwealth to sue out a writ of error was that the writ had not been specially allowed, of which the court said: "There is nothing in the disabling provisos of the statutes to limit the right of the commonwealth; and the powers of this court, whether deduced from the common law, from the old provincial act of 1722, or from legislation under our state Constitutions, are quite competent to the review of any judicial record, when no statutory restraints have been imposed. It would be very strange if the commonwealth might not appeal to her own tribunals for justice without the special consent of certain of her own officers." This theory that the state may sue out a writ of error, unless expressly denied it by statute, is opposed to the view maintained by a host of decisions above cited; and it is observable that such judges as Judge Thompson and Judge Sharswood were in favor of quashing writs so sued out. Com. v. Capp (1864) 48 Pa. 53, 56; Com. v. Moore (1882) 99 Pa. 570, 576.

In many of the states, indeed, including some of those above mentioned, the right to sue out a writ of error, or to take an appeal in the nature of a writ of error, in criminal cases, has been given to the state by positive statute. But the decisions above cited conclusively show that under the common law, as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the state, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law. In either case, the defendant, having been once put upon his trial and discharged by the court, is not to be again vexed for the same cause, unless the legislature, acting within its constitutional authority, has made express provision for a review of the judgment at the instance of the government.

[The court here discussed the acts of Congress and continued:]

In none of the provisions of this act,[11] defining the appellate jurisdiction, either of this court or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States.

Writ of error dismissed for want of jurisdiction.

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[11] Judiciary Act March 3, 1891, c. 517, 26 Stat. 826 (U. S. Comp. St. 1901, p. 547).

CHAPTER XVII

PUNISHMENT

Punishment, then, is an orderly execution of lawfull judgement, laid upon an offendour, by the Minister of the Law: and it is done for foure causes: First, for the amendment of the offendour: Secondly, for example's sake, that others may bee thereby kept from offending: Thirdly, for the maintenance of the authoritie and credite of the person that is offended: and these three reasons bee common to all such punishments. Seneca rehearseth the fourth finall cause, that is to say, that (wicked men being taken away) the good may live in better security: and this pertaineth not to all, but to capitall punishments only, as every man may at the first hearing understand.

The Romanes used especially eight sorts of Chastisements, knowen to them by these names, Damnum, Vincula, Verbera, Talio, Ignominia, Exilium, Servitus, Mors: that is, Losse of goods, Imprisonment, Stripes, Retaliation, Reproch, Banishment, Servitude, and Death: all which, our Law (before the Conquest) was wont to inflict, albeit that now Servitude, and Retaliation being gone, Banishment is almost out of use.

The Punishments that bee commonly put in execution at this day, and wherewith the Justices of the Peace have to doe, they be divided into Corporall, Pecuniarie, and Infamous.

Corporall punishment, is either Capitall, or not Capitall. Capitall (or deadly) punishment is done sundry wayes, as by hanging, burning, boiling, or pressing: not Capitall, is of divers sorts also, as cutting off the hand or eare, burning (or marking) the hand, face, or shoulder, whipping, imprisoning, stocking, setting on the Pillory, or Cucking-stoole, which in olde time was called the Tumbrell. Of this kind of punishment, our old Law (making precious estimation of the lives of men) had moe sorts than we now have: as pulling out the tongue, for false rumours, cutting off the nose, for adultery, taking away the privy parts, for counterfeiting of money, etc.

Under the name of Pecuniary punishment, I comprehend all Issues, Fines, Amerciamets, and Forfeitures of Offices, goods, or lands.

And if the Justices of Peace may by vertue of their Commission, deale with such Conspirators as doe confederate together, to cause any persons unjustly to be indicted of felony, whereof afterward he is acquitted (as some doe thinke they may) then is there a speciall punishment in that case appointed by law, which in 24 E. 3, 73, is termed Villanous, and may be wel called Infamous, because the judgment in such case shall be like unto the ancient judgment in attaint (as it is said

4 H. 5, Fitzh. Judgment, 220), and is (in 27 Lib. Ass. pl. 59.) set downe to bee, that their Oathes shall not bee of any credit after: nor lawfull for them in person to approach the King's Courts: and that their lands & goods be seised into the King's hands: their trees rooted up, and their bodies imprisoned &c. And at this day, the punishment appointed for perjury (having somewhat more in it than Corporall, or Pecuniary paine) stretching to the discrediting of the testimony of the offendour for ever after, may be partaker of this name.

Lambard, Eirenarcha, bk. 1, c. 12.

FELTON'S CASE.

(Court of Common Bench, 1628. Hetley, 126.)

Memorand. quod Thursday 29 die November, 1628. John Felton was arraigned in the King's Bench, for the murder of George, Duke of Buckingham. And the Justices of the Common Bench demanded of the Serjeants of the King, who were present in the King's Bench, what was done with Felton. And Ashley answered, That he had confessed the fact, and that the ordinary sentence of death was given against him. But they marvelled that for so notorious offence, the sentence was not, that he should be hanged in chains.

Yelverton. That any other sentence than the ordinary sentence cannot be given. But after that he is dead, his body was at the disposition of the King, which was not denyed by the other Justices.

TERRITORY v. KETCHUM.

(Supreme Court of New Mexico, 1901. 10 N. M. 718, 65 Pac. 169, 55 L. R. A. 90.)

Parker, J. The appellant was convicted in Union county, in the Fourth judicial district, under section 1151 of the Compiled Laws of 1897, which is as follows: "If any person or persons shall willfully and maliciously make any assault upon any railroad train, railroad cars, or railroad locomotives within this territory, for the purpose and with the intent to commit murder, robbery, or any other felony upon or against any passenger on said train or cars, or upon or against any engineer, conductor, fireman, brakeman, or any officer or employé connected with said locomotive, train or cars, or upon or against any express messenger, or mail agent on said train, or in any of the cars thereof, on conviction thereof shall be deemed guilty of a felony and shall suffer the punishment of death." Judgment was rendered upon the verdict, and the appellant sentenced to death by hanging, as provided by section 1067, Id. The case is here on appeal, and presents the single question whether the death penalty, as applied to this offense, is a cruel and unusual punishment, within the prohibition of the eighth amendment to the Constitution of the United States.

It may be assumed that the death penalty, in a proper case, is not cruel, within the prohibition of the Constitution. In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519. And it is a matter of common knowledge that it is not unusual; it being employed in nearly all the states, as well as by the United States, as a punishment for crime. But it is contended by counsel for appellant that the death penalty is such an excessive punishment in degree for the offense of which the defendant stands convicted as to be within the prohibition of the Constitution. Much difficulty has been expressed by both courts and text-writers in attempting to define the scope of this constitutional provision. Some courts have thought that it was never intended as a limitation upon legislative discretion in determining the severity of punishment to be inflicted, but, rather, refers to the mode of infliction. Thus, in Aldridge v. Com., 2 Va. Cas. 447, 449, it is said: "That provision was never designed to control the legislative right to determine ad libitum upon the adequacy of punishment, but is merely applicable to the modes of punishment." In Com. v. Hitchings, 5 Gray (Mass.) 482, 486, it is said: "The question whether the punishment is too severe and disproportionate to the offense, is for the Legislature to determine." In Sturtevant v. Com., 158 Mass. 598, 33 N. E. 648, it is said: "This article is directed to courts, not to the Legislature." It may be, however, that the decisions in Massachusetts are based upon the peculiar language of their Constitution, which is: "No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

In State v. Williams, 77 Mo. 310, 312, it is said: "The interdict of the Constitution against the infliction of cruel and unusual punishments would apply to such punishments as amount to torture, or such as would shock the mind of every man possessed of common feeling—such, for instance, as drawing and quartering the culprit, burning him at the stake, cutting off his nose, ears, or limbs, starving him to death, or such as was inflicted by an act of parliament as late as 22 Hen. VIII., authorizing one Rouse to be thrown into boiling water and boiled to death for the offense of poisoning the family of the Bishop of Rochester. * * * If, under the statute in question [defining and providing punishment for the crime of obtaining money under false pretenses], a punishment by imprisonment for life of one who is convicted of the offense therein defined should be inflicted, it might well be said that such punishment would be excessive, or, rather, entirely disproportioned to the magnitude of the offense, yet notwithstanding this, there is high authority for saying that 'the question whether the punishment is too severe and disproportionate to the offense is for the Legislature to determine.'"

In People v. Morris, 80 Mich. 634, 638, 45 N. W. 591, 592, 8 L. R. A. 685, 686, it is said: "The difficulty in determining what is meant by 'cruel and unusual punishment,' as used in our Constitution, is apparent. Counsel for defendants claims that, as properly understood, it means, when used in this connection, punishment out of proportion to the offense. If by this is meant the degree of punishment, we do not think the contention correct. When in England, concessions against cruel and unusual punishments were first wrested from the crown, slight offenses were visited with the most extreme punishment, and no protest was made against it." In Garcia v. Territory, 1 N. M. 415, 418, this court said: "The word 'cruel,' as used in the amendatory article of the Constitution, was, no doubt, intended to prohibit a resort to the process of torture, resorted to so many centuries as a means of extorting confessions from suspected criminals under the sanction of the civil law. It was never designed to abridge or limit the selection by the lawmaking power of such kind of punishment as was deemed most effective in the punishment and suppression of crime."

This provision of the Constitution was before the Supreme Court of the United States in Wilkerson v. Utah, 99 U. S. 130, 25 L. Ed. 345. In that case the question was whether a judgment directing the infliction of the death penalty by shooting was cruel and unusual. The court said: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to (4 Bl. Comm. 377), where the prisoner was drawn or dragged to the place of execution, in treason; where he was emboweled alive, beheaded, and quartered, in high treason; cases of public dissection, in murder; and of burning alive, in treason committed by a female—and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution."

In Re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519, the question was whether the method adopted by the New York statute of inflicting the death penalty, which was by electrocution, was cruel and unusual. The court said: "This declaration of rights (Act of Parliament of 1688; 1 Wm. & Mary, c. 2) had reference to the acts of the executive and judicial departments of the government of England; but the language in question, as used in the Constitution of the state of New York, was intended particularly to operate upon the Legislature of the state, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offense against the laws of the state were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the eighth amendment, in its application to congress. * * * Punishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous—something more than the mere extinguishment of life."

It is true that, in both of the cases quoted from, the Supreme Court had before them for consideration not the question of the severity of a punishment, but simply the question of the method of inflicting the death penalty; but in both those cases, the court limit the meaning of the word "cruel," as used in the Constitution, to something which involves torture. If this be the test in all cases, then it must be clear that legislative discretion in determining the severity of punishment for crime is not to be interfered with by the courts, so long as all forms of torture are avoided. In 1 Bish. Cr. Law, § 947, it is said: "Evidently, in reason, the punishments commonly inflicted at the time when the Constitution was adopted could not be deemed 'unusual,' and no punishment is 'cruel' simply because it is severe, or 'cruel and unusual' because it is disgraceful. But mere torture, however slight, would be within the prohibition." Mr. Tiedeman, in his work on Limitations of Police Power (page 21), says: "But would the infliction of capital punishment for offenses not involving the violation of the right to life and personal security be such a 'cruel and unusual punishment' as that it would be held to be forbidden by this constitutional provision? It would seem to me that the imposition of the death penalty for the violation of the revenue laws (i. e., smuggling), or the illicit manufacture of liquors, or even for larceny or embezzlement, would properly be considered as prohibited by this provision, as being 'cruel and unusual.' But, if such a construction prevailed, it would be difficult to determine the limitations to the legislative discretion."

It would, indeed, seem to be a matter of great doubt, in view of the foregoing expressions of opinion on this subject, whether the courts, in any case, have the power to review legislative discretion in determining the severity of punishment for crime, so long as all forms of torture have been avoided. Judge Cooley, however, in his work on Constitutional Limitations, draws a distinction which seems not to have been usually recognized. He says: "It is certainly difficult to determine precisely what is meant by 'cruel and unusual punishments.' Probably any punishment declared by statute for an offense which was punishable in the same way at the common law could not be regarded as cruel or unusual, in the constitutional sense. And probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of similar nature. But those degrading punishments which in any state had become obsolete before its existing Constitution was adopted, we think, may well be held forbidden by it, as cruel and unusual." Cooley, Const. Lim. (3d Ed.) 329. If we understand the language of the learned author, a punishment provided by statute for an offense, of a kind as, for example, death by hanging, or imprisonment, is not prohibited by the constitutional provision, if at common law a like kind of punishment was authorized for offenses of a similar nature.

If this be the test, then it is clear that the penalty prescribed in the case at bar is within the rule laid down; for assault with intent to rob was a felony at common law, or at least was made so by St. 7 Geo. 2, c. 21 (1 Jac. Dict. tit. "Assault"; 1 Hawk. P. C. c. 15, p. 113), and as such punishable with death, unless otherwise provided by statute (1 Jac. Dict. tit. "Felony"; 1 Bish. Cr. Law, § 935). It is thought, however, by some of the courts, that the constitutional provision under consideration is broad enough to confer upon the court the power to review legislative discretion concerning the adequacy of punishment. Thus, in State v. Becker, 3 S. D. 29, 41, 51 N. W. 1018, 1022, it is said: "It is a very noticeable fact that this question has seldom been presented to the courts, and we take this fact to signify that it has been the common understanding of all that courts would not be justified in interfering with the discretion and judgment of the Legislature, except in very extreme cases, where the punishment proposed is so severe and out of proportion to the offense as to shock public sentiment and violate the judgment of reasonable people." This doctrine has been recognized in a number of cases, some of which we cite: In re MacDonald, 4 Wyo. 150, 33 Pac. 18; In re Bayard, 63 How. Prac. (N. Y.) 73, 76; Thomas v. Kinkead, 55 Ark. 502, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68. See, also, State v. Driver, 78 N. C. 423; also dissenting opinions of Justices Field, Harlan, and Brewer in O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450.

While we have arrived at a conclusion that the discretion of the Legislature in determining the adequacy of the punishment for crime is almost, if not quite, unlimited, yet such a conclusion is entirely unnecessary to an affirmance of this judgment. Assuming, for the sake of argument, that the courts may, in extreme cases, review the discretion of the Legislature in determining the severity of punishment, still we see no reason why this statute under consideration should be held to be unconstitutional by reason of its severity. The act under which the defendant was convicted was passed in 1887, and has been upon the statute books, unchallenged by the people of the territory, ever since that time. It has evidently met with the approval of the people, and has not been deemed by them cruel on account of its severity. It is hardly necessary to recall the incidents attending the ordinary train robbery, which are a matter of common history, to assure every one that the punishment prescribed by this statute is a most salutary provision, and eminently suited to the offense which it is designed to meet. Trains are robbed by armed bands of desperate men, determined upon the accomplishment of their purpose; and nothing will prevent the consummation of their design—not even the necessity to take human life. They commence their operations by overpowering the engineer and fireman. They run the train to some suitable locality. They prevent the interference of any person on the train by intimidation or by the use of deadly weapons, and go so far as to take human life in so preventing that interference. They prevent any person from leaving the train for the purpose of placing danger signals upon the track to prevent collisions with other trains, thus willfully and deliberately endangering the life of every passenger on board. If the express messenger or train crew resist their attack upon the cars, they promptly kill them. In this and many other ways they display their utter disregard of human life and property, and show that they are outlaws of the most desperate and dangerous character.

In the case at bar, while the record of the testimony is not before us, it is a matter of current history that, while he was the lone robber, the defendant shot the mail clerk through the face, and the conductor through the arm, and only desisted from his attack upon the train when he was shot through the arm by the conductor. His manner of conducting this business of train robbery was but a sample of what is being done by those engaged in that business in all parts of the country, except that he undertook the business single-handed. It is true that this statute makes an attempt at train robbing the offense for which the death penalty is to be inflicted. It is also true that in this case the offense of the defendant was but an attempt, he having failed to accomplish his purpose. Ordinarily the death penalty for an attempt to commit an act would be a most severe punishment; but, taking into consideration all the circumstances usually attending a train robbery or an attempted train robbery, we cannot say that we deem the death penalty in any degree excessive, as compared with the gravity of the offense, if the death penalty is to be inflicted for any violation of the criminal laws.

We conclude, therefore, that the statute in question is not in violation of the eighth amendment to the Constitution of the United States, and, there being no error in the record, the judgment of the lower court will be affirmed, and the judgment and sentence of the district court shall be executed on Friday, March 22, A. D. 1901; and it is so ordered.[1]

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[1] The provisions of the Philippine Penal Code, under which the falsification by a public official of a public and official document is punished by fine and imprisonment at hard and painful labor for a period ranging from twelve years and a day to twenty years, the prisoner being subject, as accessory to the main punishment, to carrying, during his imprisonment, a chain at the ankle, hanging from the wrist, to deprivation during the term of imprisonment of civil rights, and to perpetual absolute disqualification to enjoy political rights, etc., and to surveillance of the authorities during life, is cruel and unusual punishment, within the terms of the Philippine Bill of Rights. Weems v. U. S., 217 U. S. 349, 30 Sup. Ct. 544, 54 L. Ed. —— (1909).

PEOPLE ex rel. BRADLEY v. SUPERINTENDENT, ETC., OF ILLINOIS STATE REFORMATORY.

(Supreme Court of Illinois, 1894. 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139.)

BAKER, C. J. A writ of habeas corpus was issued herein by order of this court, upon the petition of Tida Bradley, for the purpose of inquiring into the cause of the imprisonment and detention of Joseph Bradley and Harry Justice in the Illinois State Reformatory at Pontiac. * * *

The return to the writ showed that Joseph Bradley and Harry Justice, being of the age of eighteen and twenty years respectively, had, on conviction of burglary and larceny, been sentenced by the court to be confined in the State Reformatory "during a term of commitment to be terminated by the board of managers of said Illinois State Reformatory." [2]

It is admitted by the relator that the judgment and sentence of the court was in accordance with the provisions of the statute, since the statute requires that every sentence to the reformatory of a person between the ages of 16 and 21 years, convicted of a felony or other crime, shall be a general sentence to imprisonment in the Illinois State Reformatory, that the courts imposing the sentence shall not fix or limit the duration thereof, and that the term of imprisonment shall be terminated by the board of managers, as authorized by the act.

It is insisted, however, that as, by the judgment and warrant of commitment, the imprisonment was not for a specified time, but "to be terminated by the board of managers of the Illinois State Reformatory," the judgment and mittimus were void for uncertainty, and that the statute which makes provision for such a judgment is unconstitutional and invalid; and in that behalf reliance is placed upon the case of People v. Pirfenbrink, 96 Ill. 68, where it was held that all judgments must be specific and certain, and must determine the rights recovered or the penalties imposed.

We think that the judgment and mittimus in this case must be read and interpreted in the light of, and under the restrictions imposed by, the statute upon which they are based. That statute provides that although the sentence is a general sentence to imprisonment, yet that "such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced." This provision, and others of like import, being read into the judgment and mittimus, we think that it should be regarded that the judgment and commitment in this case was for 20 years, that being the maximum term provided by law for the crime of burglary. The fact that the prisoners might, in accordance with the provisions of the act, be sooner discharged by an order of court, predicated upon the recommendation of the board of managers of the reformatory, or by the pardon or commutation of the governor, would not have the effect of rendering the sentence and commitment uncertain and indefinite. It follows that it is provided by the statute, and by the judgment and commitment herein, for what period of time Joseph Bradley and Harry Justice are to be detained in the reformatory.

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[2] Part of the opinion is omitted, and this statement is substituted for that in the report.

It is insisted that, even if this be so, yet the punishment is not proportioned to the offense committed, and that the statute is in violation of that portion of section 11 of article 2 of the Constitution of the state which declares that "all penalties shall be proportioned to the nature of the offense." In 2 Blackstone's Commentaries, book 4, § 12, it is said: "The method of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it." And it is there also said: "The quantity of punishment can never be absolutely determined by any standing, invariable rule, but it must be left to the arbitration of the Legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be best calculated to answer the end of prevention against future offenses." In fact, the object of punishment is the prevention of future offenses; and such object is to be attained in three ways—by the amendment of the offender himself, by deterring others through his example, and by depriving the guilty party of the power to do further mischief. Id. pp. 11, 12; 4 Am. & Eng. Enc. Law, 721. Imprisonment is not a cruel and unusual punishment for burglary or larceny, or other crime, and on that ground to be regarded as disproportioned to the nature of the offense. 4 Am. & Eng. Enc. Law, p. 722, and authorities cited in notes. The term of the imprisonment, if it does not extend to perpetual imprisonment, is to a great extent, if not altogether, a matter of legislative discretion. For very many years the statute of this state has been such that the punishment for burglary might extend to a term of imprisonment of 20 years, and the validity of such statute has not been, and could not successfully be, called in question. And, even if the statute fixing the punishment for burglary was such as that it imposed an absolute penalty of 20 years' imprisonment upon every conviction for such crime, its validity could not, on that ground, be impeached.

When the Legislature has authorized a designated punishment for a specified crime, it must be regarded that its action represents the general moral ideas of the people, and the courts will not hold the punishment so authorized as either cruel and unusual or not proportioned to the nature of the offense, unless it is a cruel or degrading punishment, not known to the common law, or is a degrading punishment which had become obsolete in the state prior to the adoption of its Constitution, or is so wholly disproportioned to the offense committed as to shock the moral sense of the community. See In re Bayard, 25 Hun, 546. Neither the infliction of 20 years' imprisonment for the crime of burglary, nor the infliction, for the violation of any provision of the Criminal Code, of the maximum quantity of the usual punishment for such violation, falls within either of these categories. We think that, from the fact that the statute here in question imposes the maximum term of imprisonment provided by law for the crime for which the prisoner is convicted, it does not follow that such statute is in violation of the constitutional requirement that all penalties shall be proportioned to the nature of the offense.

Nor is it true that a prisoner on trial for burglary and larceny, or for any other violation of the criminal law, has a constitutional right to have the quantity of his punishment fixed by a jury. At common law the jury either returned a special verdict, setting forth all the circumstances of the case, and praying the judgment of the court thereon, or a general verdict of guilty or not guilty. The punishment was fixed by the court, and governed by the laws in force. 2 Bl. Comm. bk. 4, p. 361. And in this state, and at the present time, the penalties for violations of the Criminal Code are, in many cases, not fixed by the jury, but by the court. Rev. St. p. 534, §§ 416, 447, et seq. The constitutional right of trial by jury is limited to the trial of the question of guilt or innocence, and we think there can be no question of the validity of the sections of the statute to which we have made reference in this connection. In the event that a man of adult years commits the crime of burglary, he may be imprisoned in the penitentiary for a term not less than 1 year, nor more than 20 years, and, if he pleads not guilty, then the jury say in their verdict for what length of time, within the limits fixed by the statute, he shall be confined in the penitentiary. Crim. Code, §§ 36, 444.

It is provided, in substance, in sections 10, 12, and 13 of the statute now under consideration, that if a minor between the ages of 16 and 21 years commits such crime, and has not previously been sentenced to a penitentiary, then the jury shall not fix the punishment, but his sentence shall be a general sentence to imprisonment in the state reformatory, the effect of which shall be imprisonment in such reformatory for the maximum term provided by law for the crime, i. e., for 20 years, unless such imprisonment is sooner terminated by the board of managers of the reformatory in the manner authorized by the act. In other words, the adult has the statutory right to have the question submitted to the decision of a jury whether his term of imprisonment shall be 1 year, or some other space of time, to be fixed by them, and not exceeding 20 years, while for the same offense, and under like circumstances, the minor is necessarily sentenced to imprisonment for 20 years, the maximum term provided by law for the offense.

Is there such inequality and injustice in this as that it can be regarded that the penalty imposed upon the minor is not proportioned to the nature of the offense of which he is convicted? There is in the law of nature, as well as in the law that governs society, a marked distinction between persons of mature age and those who are minors—

the habits and characters of the latter are presumably, to a large extent, as yet unformed and unsettled. This distinction may well be taken into consideration by the legislative power in fixing the punishment for crime, both in determining the method of inflicting punishment, and in limiting its quantity and duration. An adult convicted of burglary would be sentenced to the penitentiary, and to either solitary confinement or hard labor therein; and the statute which consigns him to such punishment must be regarded as highly penal. A minor, however, instead of being sentenced to solitary confinement or hard labor in a penitentiary, is committed to the state reformatory. The general scope and humane and benign purpose of the statute establishing the reformatory is clearly indicated by the following provisions, found in section 6: "It shall be the duty of the managers to provide for the thorough training of each and every inmate in the common branches of an English education; also in such trade or handicraft as will enable him upon his release to earn his own support. For this purpose said managers shall establish and maintain common schools and trade schools in said reformatory, and make all needful rules and regulations for the government of the same." And such beneficent purpose is also shown by the provision in section 8, that the general superintendent of the institution shall have charge of its inmates, and shall discipline, govern, instruct, employ, and use his best efforts to reform them; and numerous other provisions of like tendency and effect are to be found in the act, such as those for the releasing of prisoners upon parole, where arrangements have been made for honorable and useful employment in some suitable employment, and for the final discharge of prisoners from further liability under their sentences, etc.

It is manifest that the sentences provided for in the statute establishing the reformatory, although to be regarded as punishments for crime, are not of so purely a penal character as those imposed upon adults convicted of like offenses; but that the primary object of the statute is the reformation and amendment of those committed to the reformatory. It follows, therefore, that the case of an adult liable to be sentenced to the penitentiary for the crime of burglary for a term of not less than 1, nor more than 20, years, is not parallel to that of a minor required to be sentenced to the state reformatory for a term of 20 years for the like offense, and that no comparison can be instituted between them, and conclusion arrived at therefrom that the penalty imposed upon the minor is not proportioned to the nature of the offense of which he is convicted. Upon full consideration we find no just ground for holding that the act establishing the reformatory is in conflict with section 11 of article 2 of the Constitution of this state. * * *

We are unable to arrive at the conclusion that either Joseph Bradley or Harry Justice is wrongfully, illegally, or without warrant of law imprisoned and deprived of his liberty in the Illinois State Reformatory at Pontiac; and they are therefore remanded to the custody of the constituted authorities of said reformatory, and the writ of habeas corpus herein is dismissed, at the cost of the petitioner. Writ dismissed.[3]

SHOPE and MAGRUDER, JJ., dissent.

[3] The court also held that the judgment was not void for uncertainty, as the judgment taken in connection with the statute, which provided that "such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced," fixed the term of imprisonment. The court held, also, that the statute was not unconstitutional, as infringing the right of trial by jury, because it provided that the punishment should be assessed by the court, instead of by the jury.

In Miller v. State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109 (1898), a similar statute was held not to provide for cruel and unusual punishment. A similar statute was held unconstitutional in People v. Cummings, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285 (1891).

The fact that a statute does not fix a maximum fine for its violation does not render it obnoxious to a constitutional provision prohibiting the imposition of excessive fines. In re Yell, 107 Mich. 228, 65 N. W. 97 (1895).

APPENDIX

FORMS OF INDICTMENTS

Indictment for Murder at Common Law.

State of ————, County of ———— ss.

At the ———— court holden at ————, in and for the county of ————, on the second Monday of April in the year of our Lord one thousand nine hundred and ten, the jurors of the State of ————, upon their oath present that A. B., late of ————, in the county of ————, in the State of ————, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the ———— day of ————, in the year of our Lord one thousand nine hundred and ten, at ————, in the county of ————, in and upon one C. D., in the peace of the State then and there being, feloniously, willfully, and of his malice aforethought did make an assault, (*) and that the said A. B. with a certain drawn sword made of iron and steel, of the value of five dollars, which he, the said A. B., in his right hand then and there had and held, him, the said C. D., in and upon the left side of the belly of him, the said C. D., then and there feloniously, willfully, and of his malice aforethought did strike, thrust, stab, and penetrate, giving unto the said C. D. then and there, with the sword drawn as aforesaid, in and upon the left side of the belly of him, the said C. D., one mortal wound, of the breadth of one inch, and the depth of nine inches; of which said mortal wound he, the said C. D., at, etc., aforesaid, from the said, etc., until, etc., did languish, and languishing did live, on which said, etc., the said C. D., at, etc., aforesaid, of the said mortal wound did die; and so the jurors aforesaid, upon their oath aforesaid, do say that the said A. B. him, the said C. D., in the manner and by the means aforesaid, feloniously, willfully, and of his malice aforethought did kill and murder, against the peace and dignity of the State of ————.[1]

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[1] The following forms of indictments are either copied or adapted from the forms in 3 Chitty, Cr. Law. For shorter forms, the student is referred to Bishop, Dir. & Forms, and to statutes of the several states.

Indictment for Manslaughter.

[As in murder to (*), omitting the words "malice aforethought"], in the highway, and a certain cart, of the value of fifty dollars, then and there drawn by two horses, of the value of one hundred dollars, which he, the said A. B., was then and there driving in and along the said highway, in and against the said C. D. feloniously did force and drive, and him, the said C. D., did thereby then and there throw to and upon the ground, and did then and there feloniously force and drive one of the wheels, to wit, the off wheel of the said cart, against. upon, and over the head of him, the said C. D., then lying upon the ground, and thereby did then and there give to the said C. D. in and upon his head one mortal fracture and contusion, of which the said C. D. then and there instantly died. And so the jurors, etc., do say that the said A. B. him, the said C. D., in manner and by the means aforesaid, feloniously did kill and slay, against the peace, etc.

Indictment for an Attempt to Murder.

The jurors, etc., that A. B., etc., being a person of a wicked mind and disposition, and maliciously intending to poison one C. D., of, etc., aforesaid, on, etc., did knowingly, willfully, and maliciously put a large quantity of corrosive mercury sublimate (being a deadly poison) into a teakettle filled with water, which water he, the said C. D., had then and there immediately before directed the said A. B. to boil, in order to make a certain liquor called tea for his own drinking; and she, the said A. B., did then and there knowingly, willfully, and maliciously boil the said corrosive mercury sublimate in the said water, and the said water, in which the said corrosive mercury sublimate was so boiled, as aforesaid, did immediately afterwards, to wit, on, etc., aforesaid, there delivered to the said C. D., to use for the making of the said liquor called tea; and the said C. D., not knowing the said corrosive mercury sublimate to have been in the said water, did use the same in making the said liquor called tea, and did drink a quantity of the same made with the said water, wherein the said corrosive mercury sublimate was so boiled, as aforesaid, whereby the said C. D. became and was grievously and violently distempered and injured in his body, and in extreme danger of losing his life, to the great damage of the said C. D., to the evil example of all others in the like case offending, and against the peace, etc.

Indictment for an Assault and Battery.

The jurors, etc., that A. B., etc., on, etc., with force and arms, at, etc., in and upon one C. D., in the peace of God and of the state then and there being, did make an assault, and him, the said C. D., then and there did beat, bruise, wound, and ill treat, so that his life was greatly despaired of, and other wrongs to the said C. D. then and there did, to the great damage of the said C. D., and against the peace, etc.

Indictment for Rape.

The jurors, etc., that A. B., etc., not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil, on, etc., with force and arms, at, etc., in and upon one C. D., spinster, in the peace of God and of the state then and there being, violently and feloniously did make an assault, and her, the said C. D., against the will of her, the said C. D., then and there feloniously did ravish and carnally know, against the form of the statute in such case made and provided, and against the peace, etc.

Indictment for Robbery.

The jurors, etc., that A. B., etc., on, etc., with force and arms at, etc., in and upon one C. D., in the peace of God and of the state then and there being, feloniously did make an assault, and him, the said C. D., in bodily fear and danger of his life, then and there feloniously did put, and one gold watch, of the value of fifty dollars, of the goods and chattels of him, the said C. D., from the person, and against the will of the said C. D. then and there feloniously and violently did steal, take, and carry away, against the peace, etc.

Indictment for Larceny.

The jurors, etc., that A. B., etc., on, etc., with force and arms, at, etc., aforesaid, one silver spoon, of the value of one dollar, of the goods and chattels of one C. D., two brass candlesticks, of the value of three dollars, and two linen shirts, of the value of five dollars, of the goods and chattels of E. F., then and there being found, feloniously did steal, take, and carry away, against the peace, etc.

Indictment for Embezzlement.

The jurors, etc., that A. B., etc., on, etc., at, etc., was clerk to C. D., etc., and employed and entrusted by the said C. D. to receive money for him, and being such clerk so employed and entrusted as aforesaid, then and there, by virtue of such employment and entrustment as aforesaid, he, the said A. B., did receive and take into his possession a certain sum of money, to wit, the sum of ten dollars, for and on the account of the said C. D., his said master and employer, and having so received and taken into his possession the said sum of money, for and on the account of his master and employer, he, the said A. B., then and there, with force and arms, fraudulently and feloniously[2] did embezzle and secrete part of the said sum of money, to wit, the sum of four dollars. And so the jurors aforesaid, do say that the said A. B. did then and there, in manner and form aforesaid, feloniously steal, take, and carry away from the said C. D., his said master and employer, the said sum of four dollars of the monies of the said C. D., for whose use, and on whose account, the same was delivered to and taken into the possession of him the said A. B., being such clerk so employed and entrusted as aforesaid, against the form of the statute, etc.

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[2] If a felony.

Indictment for Burglary.

The jurors, etc., that A. B., etc., on, etc., about the hour of one in the night of the same day, with force and arms, at, etc., the dwelling house of C. D., there situate, feloniously and burglariously did break and enter with intent the goods and chattels of the said C. D., in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take, and carry away, and then and there, with force and arms, one silver tankard, of the value of twenty-five dollars, of the goods and chattels of the said C. D., in the same dwelling house then and there being found, then and there feloniously and burglariously did steal, take, and carry away, against the peace, etc.

Indictment for Obtaining Property by False Pretense.

The jurors, etc., that A. B., etc., on, etc., with force and arms, unlawfully, knowingly, designedly, did falsely pretend to one C. D., then being one of the overseers of the poor of the county aforesaid, that a certain female child, which he, the said A. B., had with him, belonged to the said county (meaning that the said female child was a pauper of and belonging to the said county of ————), and that she was born at W., in the same county, and that he, the said A. B., had married the said child's mother, and that she had lived with him three years, and then died (meaning that he the said A. B. had been married to the mother of the said female child, and that the mother of the said female child had cohabited and lived with him, the said A. B., three years after such marriage, and then died), and that his family was very large, and that he was not able to support the said child without some relief from the said county, by means of which said false pretenses he, the said A. B., did then and there unlawfully, knowingly, and designedly obtain, acquire, and get into his hands and possession of and from the said C. D. three dollars of the money of the said C. D., with intention then and there to cheat and defraud him of the same, whereas in truth and in fact the said female was not a pauper of and belonging to the said county, nor was she born in the said county, and whereas in truth and in fact the said A. B. had not been married to the said child's mother, nor had she lived with him three years and then died, to the great damage and deceit of the said C. D., to the evil example, etc., against the form of the statute, etc.

Indictment for a Libel at Common Law.

The jurors, etc., that A. B., etc., being a person of an evil, wicked, and malicious mind and disposition, and unlawfully, wickedly, and maliciously devising, contriving, and intending, as much as in him lay, to scandalise, vilify, and defame one C. D., and to bring him into public scandal, infamy, and disgrace, and to injure, prejudice, and aggrieve him, the said C. D., on, etc., with force and arms, at, etc., aforesaid, of his great hatred, malice, and ill will towards the said C. D., unlawfully and maliciously did compose and publish, and cause and procure to be composed and published, a certain false, scandalous, malicious, and defamatory libel of and concerning the said C. D., containing therein, amongst other things, the false, scandalous, malicious, defamatory, and libelous words and matter following, of and concerning the said C. D.; that is to say, [here state the libelous matter with innuendoes]; which said false, scandalous, malicious, and defamatory libel he, the said A. B., afterwards, to wit, on, etc., aforesaid, at, etc., aforesaid, unlawfully, wickedly and maliciously did send, and cause to be sent, to one E. F., in the form of a letter addressed to the said E. F. and did thereby then and there unlawfully, wickedly, and maliciously publish, and cause to be published, the said libel, to the great damage, scandal, infamy, and disgrace of the said C. D., to the evil and pernicious example of all others in the like case offending, and against the peace, etc.

Indictment for Forgery.

The jurors, etc., that A. B., etc., on, etc., with force and arms, at, etc., aforesaid, feloniously,[3] did falsely make, forge, and counterfeit a certain promissory note, in the words, letters, and figures following, that is to say [here set out the note verbatim], with intent to defraud one C. D., against the peace, etc.

Indictment for Arson.

The jurors, etc., that A. B., etc., not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on, etc., with force and arms, at, etc., aforesaid, a certain house of one C. D., there situate, feloniously, willfully, and maliciously did set fire to, and the same house then and there, by such firing as aforesaid, feloniously, willfully, and maliciously did burn and consume, against the peace, etc.

Indictment for Conspiracy.

The jurors, etc., that A. B., etc., C. D., etc., E. F., etc., on, etc., being workmen and journeymen in the art, mystery, and manual occupation of wheelwrights and not being content to work and labor in that art and mystery by the usual number of hours in each day, and at the usual rates and prices for which they and other workmen and journeymen were wont and accustomed to work, but falsely and fraudulently conspiring and combining unjustly and oppressively to increase and augment the wages of themselves and other workmen and journeymen in the said art, and unjustly to exact and extort great sums of money for their labor and hire in their said art, mystery, and manual occupation from their masters who employ them therein, on the same day and year, at, etc., aforesaid, together with divers other workmen and journeymen in the same art, mystery, and manual occupation, whose names to the jurors aforesaid are as yet unknown, unlawfully did assemble and meet together, and, so being assembled and met, did then and there unjustly and corruptly conspire, combine, confederate, and agree among themselves that none of the said conspirators after the same ———— day of ———— would work at any lower or lesser rate than one dollar for hewing of every hundred spokes for wheels, and two dollars for making of every pair of hinder wheels for or on account of any master or employer whatsoever in the said art, mystery, and occupation, and also that none of the said conspirators would work day work, or labor any longer than from the hour of six in the morning till the hour of seven in the evening in each day, from thenceforth, to the great damage and oppression not only of their masters employing them in the said art, mystery, and manual occupation, but also of divers other persons, to the evil example, etc., and against the peace, etc.

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[3] Where it is a felony.

Indictment for Bigamy.

The jurors, etc., that A. B., etc., on, etc., at, etc., did marry one C. D., spinster, and the said C. D. then and there had for his wife, and that the said A. B. afterwards, to wit, on, etc., with force and arms, at, etc., aforesaid, feloniously did marry and take to wife one E. F., widow, and to the said E. F. was then and there married, the said C. D., his former wife, being then and there living and in full life, against the peace, etc.

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